

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1374

THE OFFICE OF COMMUNICATION, INC.
OF THE UNITED CHURCH OF CHRIST, *ET AL.*,

APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE

ON APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

All parties, intervenors, and amici appearing before this Court are listed in the brief for appellants Office of Communication, Inc. of the United Church of Christ, Inc., *et al.*

B. Rulings Under Review

In the Matter of the Applications of UTV of San Francisco, Inc., et al., 16 FCC Rcd 14975 (2001)(JA 1).

C. Related Cases

The order on appeal has not previously been before this Court. Counsel are not aware of any related cases pending in this or any other Court.

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GLOSSARY

DMA

Designated Market Area

FTS

Fox Television Stations, Inc.

IN THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 01-1374

THE OFFICE OF COMMUNICATION, INC.
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v.

FEDERAL COMMUNICATIONS COMMISSION,

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FOX TELEVISION STATIONS, INC.

INTERVENOR

ON APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Commission acted reasonably in granting Fox Television Stations, Inc. a temporary 24-month waiver of the newspaper/broadcast cross-ownership rule with respect to Fox's proposal to acquire a television station in the New York City market as part of its acquisition of ten television stations from Chris-Craft Industries.
2. Whether the Commission reasonably determined that it was not required to designate the Fox – Chris-Craft applications for an evidentiary hearing.

3. Whether the Commission adequately explained its conclusion that the public interest would be served by grant of the Fox – Chris-Craft applications.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Appendix to this brief.

COUNTERSTATEMENT OF THE FACTS

A. BACKGROUND

1. Regulatory Framework

The Communications Act requires the FCC’s consent to the assignment of a broadcast television station license. Specifically, section 310(d) of the Act, 47 U.S.C. 310(d), provides that:

No ... station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner ... except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under [47 U.S.C.] section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the ... license to a person other than the proposed transferee or assignee.

Section 309(b) of the Act, 47 U.S.C. 309(b), provides that before certain license applications can be granted, including applications for the assignment of a license such as the ones at issue in this case, the Commission must issue a public notice followed by a 30-day waiting period in which, pursuant to 47 U.S.C. 309(d), any “party in interest” may file a petition to deny the application.

Section 309(d) also provides that where a petition to deny has been filed:

If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with [the public interest, convenience, and necessity], it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition.

The statute requires the Commission to designate an application for an evidentiary hearing “[i]f a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with [the public interest, convenience, and necessity].” 47 U.S.C. 309(d)(2), (e).

The assignment applications in this case implicated several FCC rules governing the ownership of television broadcast stations. Appellants focus in their brief on only one of those rules – the newspaper/broadcast cross-ownership rule. *See* 47 C.F.R. 73.3555(d)(3). That rule, adopted in 1975, prohibits common ownership of a full-service broadcast station and a daily newspaper when the broadcast station’s service contour encompasses the newspaper’s city of publication. As the Commission explained when it adopted the rule, “[t]he multiple ownership rules,” such as the newspaper/broadcast cross-ownership rule, “rest on two foundations: the twin goals of diversity of viewpoints and economic competition.”¹ In September 2001, the Commission began a rule making proceeding to examine whether or to what extent it should revise the newspaper/broadcast cross-ownership rule. *See Cross-Ownership of Broadcast Stations and Newspapers*, 16 FCC Rcd 17283 (2001). That proceeding is currently ongoing.

2. The Fox – Chris-Craft Applications

On September 18, 2000, Fox Television Stations, Inc. (Fox)² and Chris-Craft Industries (Chris-Craft) filed with the FCC applications for consent to the assignment of the licenses of ten television stations held by Chris-Craft subsidiary corporations to Fox. *See* JA 38. Fox was the

¹ *Second Report and Order in Docket 18110*, 50 F.C.C.2d 1046, 1074, *on reconsider.*, 53 F.C.C.2d 589 (1975), *aff’d in part and rev’d in part*, *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938 (1977), *aff’d in part and rev’d in part*, 436 U.S. 775 (1978).

² Fox Television Stations, Inc. is one of a number of inter-related corporate entities involved in this transaction. *See, e.g., MO&O*, 16 FCC Rcd at 14993-94 (JA 19-20). For convenience, we will refer to these entities generally as “Fox” unless a specific identification is needed for clarity. The identity of the various corporate entities is not relevant to any of the issues presented by appellants.

licensee of 24 television broadcast stations at the time. It is controlled by Rupert Murdoch through a variety of corporate entities.

The proposed combination of Fox's and Chris-Craft's stations created conflicts with the requirements of several of the Commission's ownership rules, and the applications were accompanied by requests for temporary waiver of the relevant rules to permit Fox a period in which to bring its proposed new operations into compliance with those rules. As noted above, appellants seek review of Commission action on only one of those waiver requests – the request for waiver of the newspaper/broadcast cross-ownership rule to permit common ownership by Fox of the *New York Post* daily newspaper and a Chris-Craft television station – WWOR-TV – licensed to Secaucus, New Jersey but within the New York City DMA.³

Prior to the proposed Chris-Craft transaction, Fox and Murdoch had received a permanent waiver of the newspaper/broadcast cross-ownership rule in 1993 to permit Murdoch to control both the *New York Post* and television station WNYW(TV) in New York City. *See Fox Television Stations, Inc.*, 8 FCC Rcd 5341, *recon. denied*, 8 FCC Rcd 8744 (1993), *aff'd*, *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C.Cir. 1995).⁴ The Commission had

³ DMA's – Designated Market Areas – have been developed by a private company, Nielsen Media Research, in order to identify TV stations whose broadcast signals reach a specific area and attract the most viewers. "A DMA consists of all counties whose largest viewing share is given to stations of that same market area. Non-overlapping DMA's cover the entire continental United States, Hawaii and parts of Alaska. There are currently 210 Designated Market Areas throughout the U.S." *See* <<<http://www.nielsenmedia.com/FAQ/index.html>>> (June14, 2002). The FCC employs these established market definitions to implement its media ownership rules. *See, e.g.*, 47 C.F.R. 73.3555.

⁴ Fox had originally acquired WNYW(TV) in 1985 at a time when Murdoch controlled the *New York Post*, which he had purchased in 1976. A condition of the Commission's approval of the acquisition of the television station was that Murdoch divest his interest in the *Post* within two years. *See Metromedia Radio & Television, Inc.*, 102 F.C.C.2d 1334 (1985), *reconsid. denied*, 59 Radio Reg.2d (P&F) 1211 (1986), *aff'd*, *Health and Medicine Policy Research Group v. FCC*, 807 F.2d 1038 (D.C.Cir. 1986). Murdoch sold the station in 1988. *See Metropolitan Council*, 46 F.3d at 1157; *see also News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C.Cir. 1988) The *Post* subsequently was placed into bankruptcy, which led to Murdoch's re-acquisition of the paper in 1993 following the Commission's grant of a permanent waiver of the cross-ownership rule discussed above.

concluded in that case that enforcement of the rule was likely to have the unintended consequence of the demise of the *Post* and that any cost to diversity would be outweighed by preservation of the *Post*. The Commission also found that in view of the wide array of media voices in New York City, any detriment to diversity by common ownership of the paper and a television station would be negligible. *See* 8 FCC Rcd at 5350-53.

In its application here, Fox argued that because the Commission had already granted it a permanent waiver of the newspaper/broadcast cross-ownership rule it should be permitted to create a qualifying television station duopoly, like any other owner of a New York television station, by acquiring Chris-Craft's station WWOR-TV.⁵ In the alternative, Fox sought an interim waiver pending the outcome of a rulemaking proceeding that the Commission had announced it intended to initiate to re-examine the newspaper/broadcast cross-ownership rule. *See* JA 58-77.

Fox argued that the "New York DMA is a uniquely competitive and diverse media market. While diversity and competition would not be adversely affected by FTS's ownership of WWOR-TV, a process even to consider at this time the forced divestiture of a struggling newspaper would unnecessarily jeopardize the *Post* and profoundly harm the marketplace of ideas in New York." JA 58.

Appellants opposed Commission grant of the waiver requests, arguing that Fox had failed to justify either a permanent waiver or an interim waiver pending the outcome of any rule making to consider the newspaper/broadcast cross-ownership rule. They also contended that the applications should be denied or set for evidentiary hearing, contending that grant of the applications would "gut the Commission's broadcast ownership restrictions." JA 124. With specific

⁵ The Commission had modified its rules in 1999 to permit common ownership of two television stations in the same DMA in certain limited circumstances. *See MO&O*, 16 FCC Rcd at 14982 ¶26 (JA 8).

reference to Fox's request for waiver of the newspaper/broadcast cross-ownership rule, the petition to deny argued that Fox had failed to justify grant of either a permanent or interim waiver under established Commission policies and that grant of Fox's request would undermine the rule. JA 130-46.⁶

B. THE COMMISSION'S ORDER

In a July 2001 *Memorandum Opinion and Order*, the Commission granted the applications subject to conditions to ensure compliance with the agency's ownership rules. *UTV of San Francisco, Inc.*, 16 FCC Rcd 14975 (2001)(*MO&O*)(JA 1). With respect to the requested waiver of the newspaper/broadcast cross-ownership rule, the Commission rejected Fox's claim that the existing permanent waiver granted in 1993 permitted the new combination with WWOR-TV, agreeing with the petitioners to deny that the "original waiver did not contemplate the addition of a second New York DMA television station to that combination. We agree with the Petitioners that the original waiver is not adequate to allow the combination requested here." *Id.* at 14987 ¶40 (JA 13).

The Commission also rejected Fox's request for an "interim" waiver of the rule pending the Commission's initiation and completion of the rulemaking proceeding that it had announced it intended to commence to re-examine the newspaper/broadcast cross-ownership rule. The Commission pointed out that it had made clear previously "that the mere initiation of a proceeding stating that the rule would be examined, or merely the fact that such a proceeding was on the

⁶ Appellants also argued that the ownership structure proposed by Fox would place the Chris-Craft licenses under foreign control in violation of 47 U.S.C. 310(b)(4), a matter that the Commission had previously addressed in a different context, concluding that because Rupert Murdoch is an American citizen and exercised *de jure* and *de facto* control of the licensees, Fox's ownership structure was in the public interest and thus consistent with 47 U.S.C. 310(b)(4). *See Fox Television Stations, Inc.*, 11 FCC Rcd 5714 (1995). Although this issue was discussed in some detail in the Commission's order here (*MO&O*, 16 FCC Rcd at 14977-80 ¶¶8-19 (JA 3-6)), appellants do not raise the issue on appeal.

horizon, would not be sufficient to warrant an interim waiver.” *MO&O*, 16 FCC Rcd at 14987 ¶41 (JA 14), quoting, *Stockholders of Renaissance Communications*, 13 FCC Rcd 4717, 4718 (1998).

While rejecting Fox’s argument that its existing waiver permitted acquisition of WWOR-TV or that a waiver pending a rule making proceeding was justified, the Commission concluded that grant of a temporary waiver of the newspaper/broadcast cross-ownership rule was appropriate in order that the rule would not unreasonably impede the applicants’ merger transaction:

In multiple-station, multiple-market merger transactions, such as presented here, it is not uncommon for the combined properties of the merged entity to create violations of the Commission’s ownership rules in some markets. In these circumstances, the Commission has granted temporary waivers of its rules, including the television/newspaper restriction, to permit an orderly disposition of assets and avoid forced sales. We have concluded that such transactional accommodation serves that public interest by promoting the free alienability of broadcast properties.

MO&O, 16 FCC Rcd at 14988 ¶42 (JA 14)(footnotes omitted).

The Commission observed that the twin goals of the newspaper/broadcast cross-ownership rule were to maximize diversity while preventing undue concentration. *MO&O*, 16 FCC Rcd at 14988 ¶42 (JA 14). As to the former, the record indicated that if the Commission permitted the requested common ownership of WWOR-TV and WNYW(TV), “the New York DMA will still have at least 19 independent television voices.” *Id.* at ¶43 (JA 15). Moreover, the record reflected that there are over 120 commercial and noncommercial radio stations licensed to communities within the New York market, with over 65 independently owned and operated radio station groups and that New York’s cable penetration rate is 74%, with at least 8 independent cable operators providing service in the market. *Id.* Finally, the Commission stated, Fox’s filings indicated that 25 daily newspapers are published in the DMA, as well as hundreds of local weeklies. *Id.*; see JA 71-77, 90-120. Thus, the Commission concluded, a “temporary loss of diversity, if any, in the New York market during this period will be outweighed by the benefits of

permitting an orderly sale to a qualified buyer committed to preserving the *Post* as a media voice.” *MO&O*, 16 FCC Rcd at 14989 ¶45 (JA 15).

With respect to the impact of a temporary waiver on competition, the Commission noted that of the 5 major daily newspapers in New York ranked by circulation, the *New York Post* ranks last, covering 5.3% of New York households on any given day and accounting for less than 4% of advertising revenues among the top 5 newspapers. *See MO&O*, 16 FCC Rcd at 14988 ¶44 (JA 15). By contrast, the record showed that the top-ranked *New York Daily News* covers 9.9% of households and receives 18.2% of advertising revenue and the second-ranked *New York Times* covers 9.4% of households while receiving 45.3% of advertising revenue. *Id.* The Commission also pointed out Fox’s claims that (1) competitive pressures from these other papers had forced the *Post* to cut its newsstand price from 50¢ to 25¢ in September, 2000, and (2) evidence of Fox’s commitment to further investment in the paper, including building a \$250 million printing facility in the South Bronx, in spite of the *Post*’s apparently weak competitive position. *Id.*

The Commission concluded, “[a]s a result of the diverse nature of the New York market, the clearly non-dominant position of the *Post* in that market, as well as the *Post*’s unique history of significant financial difficulties, ... that it would be in the public interest to grant FTS a temporary 24-month period within which to come into compliance with the television/newspaper cross-ownership rule in the New York market” *MO&O*, 16 FCC Rcd at 14989 ¶45 (JA 15). The Commission noted that grant of a 24-month temporary waiver was “consistent with our treatment of the television/newspaper combination created when Mr. Murdoch originally acquired WNYW(TV). We further believe that the competitive position of the *Post* may be vulnerable and thus any shorter period of time to come into compliance would run a substantial risk of a forced sale.” *Id.*

The Commission made clear that it was not directing the sale of the *Post*. “FTS and Mr. Murdoch also have the option of selling either of the two subject television stations. We are simply requiring that FTS be in compliance with our television/newspaper cross-ownership rule within 24 months from the consummation of the transaction, to the extent compliance has not been waived by the existing waiver permitting common ownership of WNYW(TV) and the *Post*. If our rules should change during that period to permit the proposed combination, then FTS and Murdoch will not need to divest the *Post* or one of the television stations to come into compliance.” *MO&O*, 16 FCC Rcd at 14989 n.73 (JA 15).

The Commission found that the applicants here were “fully qualified” and that “grant of the assignment of the licenses controlled by Chris-Craft to Fox Television Stations will serve the public interest, convenience, and necessity.” *MO&O*, 16 FCC Rcd at 14989 ¶46 (JA 16).⁷ The Commission granted the petition to deny filed by appellants Office of Communications, Inc. of the United Church of Christ, *et al.* insofar as they had opposed Fox’s requests for permanent or

⁷ The Commission’s grant was also accompanied by temporary waivers of two other ownership rules – actions that appellants do not directly challenge here. The Commission’s national television station ownership rule limits the national audience reach of any entity holding television licenses to 35% of the national television audience. *See* 47 C.F.R. 73.3555(e). Grant of these applications increased Fox’s audience reach to slightly over 40%. This rule was at issue in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, *rehearing granted in part*, 293 F.3d 537 (D.C.Cir. 2002), which was pending at the time of the Commission’s action here. Noting that the Court had stayed a portion of the Commission’s order in another case requiring an applicant coming into compliance with this rule within 12 months after grant of that application, the Commission granted Fox’s request. (JA 55-57) for a period of 12 months after the *Fox Television Stations* case is finally resolved to take necessary action to come into compliance with the national television station ownership rule. *See MO&O*, 16 FCC Rcd at 14981 ¶25 (JA 8). The Commission’s local television duopoly rule allows common ownership of two television stations in the same DMA under certain circumstances. *See* 47 C.F.R. 73.3555(b); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). This transaction would result in Fox owning two television stations in New York, Los Angeles, Phoenix and Salt Lake City. Only the Salt Lake City combination was inconsistent with Commission rules, and Fox sought a temporary 12-month waiver of the rule to make the necessary divestitures to come into compliance with the rule. JA 50-54. The Commission granted the request, finding that the relatively short period of common ownership would have little if any impact on competition and diversity in the Salt Lake City market and that granting the waiver was consistent with agency action in similar circumstances in the past. *See MO&O*, 16 FCC Rcd at 14984 ¶33(JA 10).

interim waiver of the agency's newspaper/broadcast cross-ownership rule, and it denied the petition in all other respects. *Id.* at 14989 ¶47 (JA 16).

Four of the five FCC Commissioners issued separate statements. Chairman Powell, in a separate statement supporting the Commission's action, pointed out that in the context of mass media transactions, the Commission's responsibility under the Communications Act to determine that the public interest will be served by an assignment or transfer of licenses in the context of a corporate merger "is simplified by the extensive structural ownership rules Congress and the Commission have promulgated. The benefits of these prophylactic rules are that they are clear and provide some certainty to marketplace participants. They have the additional benefit of administrative efficiency in reviewing combinations." *MO&O*, 16 FCC Rcd at 14995 (JA 21). "These rules," he noted, "embody the Commission's public interest goals of limiting the effect of market power and promoting diversity of viewpoints in the market." Thus, he added, a "transaction that complies with structural rules designed to advance the public interest (when they exist), should not be subject to further ad hoc review; otherwise the exalted benefits of such rules would be eviscerated." *Id.*

Chairman Powell pointed out that with respect to each of the temporary rule waivers granted in this case, "the *Order* conducts a public interest test under each rule; weighing the request for a temporary waiver against our underlying goals of diversity and competition in the broadcast marketplace." *MO&O*, 16 FCC Rcd at 14996 (JA 22). With respect to the newspaper/broadcast cross-ownership rule, he noted that "the *Order* points out that the New York market would still have 19 independent TV voices, over 120 commercial and noncommercial radio stations, 25 daily newspapers and hundreds of weekly papers." *Id.* at 14996-97 (JA 22-23). In light of these findings and the specific limitations of the temporary waivers balancing the

grant of a compliance period against potential harms to the goals underlying the rules, Chairman Powell was

left wondering why the minority so mischaracterizes the *Order's* grant of compliance periods as somehow constituting “permanent waivers of the Commission’s rules.” As is highlighted above, granting parties a reasonable period of time for divestiture of assets to satisfy our rules is a long-standing and well-settled Commission principle. *See Shareholders of CBS Corporation*, 15 FCC Rcd 8230, 8236 (2000) (Commission grants 12 months for company to comply with the national ownership cap); *AT&T/ MediaOne*, 15 FCC Rcd 9816 (2000) (Commission grants slightly under 12 months for company to divest assets to comply with the cable horizontal ownership cap).

Id. at 14997 (JA 23).

Commissioner Abernathy also issued a separate statement in support of the agency’s action. She emphasized that the Commission’s action

does enforce our rules, while also balancing the business needs of the parties to have an orderly transition for the new company. In this regard, I believe the size and scope of today’s marketplace demands the flexibility afforded by temporary waivers of our rules that allows companies a grace period to come into compliance post-closing. Any other approach would needlessly require parties to engage in fire sales prior to closing in hopes that their government will ultimately approve the transaction. Having been on all sides of these transactions – as an FCC employee, a businesswoman, and a private attorney – I do not believe a forced restructuring prior to government approval best serves the public interest.

MO&O, 16 FCC Rcd at 14999 (JA 25).

Commissioners Tristani and Copps filed dissenting statements contending generally that the FCC’s grant of these applications “raises serious concerns regarding the ongoing concentration in the ownership of television stations and other media.” *MO&O*, 16 FCC Rcd at 15000 (JA 26). Commissioner Tristani could not agree that “mere compliance with existing rules satisfies the public interest,” indicating a view that an applicant must identify some “specific public interest benefits” flowing from the assignment before the Commission could approve it under the Communications Act. *Id.* at 15001. Commissioner Copps essentially agreed with that position in his dissenting statement. *See MO&O*, 16 FCC Rcd at 15003 (JA 29).

SUMMARY OF ARGUMENT

The Communications Act provides that a station license may not be assigned unless the FCC finds that the transfer would serve the public interest. The Act delegates the task of determining how the public interest will best be served to the Commission, and its judgment in this regard “is entitled to substantial judicial deference.” *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). Here the FCC reasonably exercised its judgment in concluding that grant of the subject applications, accompanied by temporary waivers “to permit an orderly disposition of assets and avoid forced sales” (*MO&O*, 16 FCC Rcd at 14988 ¶42 (JA 14)), would be in the public interest. This is consistent with the approach that the Commission has followed with respect to application of the newspaper/broadcast cross-ownership rule since it was adopted more than 25 years ago.

The record here supports the Commission’s conclusion that grant of a 24-month waiver to permit Fox to come into compliance with the newspaper/broadcast cross-ownership rule presented no prospect of harm to diversity or competition in the New York City market. Appellants quarrel with the particulars of the levels of diversity and competition that exist, and of the current financial condition of the *New York Post*. However, they offer little if any basis to reject the Commission’s conclusions that the New York City market is uniquely diverse and competitive, that the *New York Post* is in a clearly non-dominant position and that any shorter period of time for Fox to come into compliance with the rule would run a substantial risk of a forced sale of the newspaper – something the Commission has always sought to avoid in enforcing this rule.

Insofar as appellants contend that even if some temporary waiver period was appropriate 24 months was too long, the Court rejected a similar argument when it reviewed an earlier assignment involving the *New York Post* and Rupert Murdoch, concluding that it should not disturb such “line-drawing” judgments by the agency “in the absence of evidence as to why a

shorter period would have achieved the same goals sought by the Commission in granting the waiver.” *Health & Medicine Policy Research*, 807 F.2d at 1045. A similar response is appropriate here. Appellants have not shown that a 12- or 18-month waiver period could have avoided the disruptive consequences of a forced sale of the newspaper.

Appellants’ contention that they presented substantial and material questions of fact that required the Commission to designate these applications for an evidentiary hearing is without foundation. The Court has recognized that Congress intended the Commission to have very substantial discretion in determining whether questions have been raised that require resolution in a trial-type hearing. The agency did not abuse that discretion in its action in this case. Appellants’ arguments in this regard are, in any event, inextricably intertwined with their arguments that Fox made an inadequate showing to justify grant of any waiver. The record supporting the reasonableness of the Commission’s judgment granting the temporary waiver also demonstrates that a hearing was not required.

The Commission adequately explained its conclusion under Section 310(d) of the Communications Act that the public interest would be served by grant of these applications. The FCC has through rule making adopted detailed regulations defining the public interest in broadcasting and seeks extensive information on application forms that applicants are required to file for assignment of licenses. In those circumstances it was reasonable for the Commission to find that submission of complete applications that proposed compliance with existing rules is a sufficient basis to conclude that the public interest showing required to grant an assignment application has been met.

ARGUMENT

I. STANDARD OF REVIEW

The Administrative Procedure Act provides that a court must uphold a federal agency's action unless that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). The Court has held that such review is "tolerant"⁸ and "highly deferential," and "presume[s] the validity of agency action."⁹ "The court must determine whether the agency has articulated a 'rational connection between the facts found and the choice made,'" and the court may "reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment."¹⁰

This case involves the FCC's decision to grant applications to assign television broadcast stations accompanied by several temporary waivers of the agency's ownership rules to permit the applicants a reasonable period of time to consummate their business transaction and bring the combined operation into compliance with FCC rules. Only one of those temporary waivers is challenged here. It is well-settled that the FCC may waive its rules to accommodate special circumstances provided it explains the reasons for making an exception.¹¹ The Court has recognized that a "narrow standard of scrutiny" applies to judicial review of such rule waivers and that the limited scope of review in such situations requires "substantial judicial deference" to the Commission's decision regarding how the public interest is best served. *Health & Medicine Policy Research Group*, 807 F.2d at 1043; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1408

⁸ *Sarasota-Charlotte Broadcasting Corp. v. FCC*, 976 F.2d 1439, 1442 (D.C.Cir. 1992).

⁹ *Kisser v. Cisneros*, 14 F.3d 615, 618 (D.C.Cir. 1994).

¹⁰ *Id.* at 619, *citing Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974) and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

¹¹ *See Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 674-75 (D.C.Cir. 1987); *Health & Medicine Policy Research Group*, 807 F.2d at 1041 n.4; *Basic Media Ltd. v. FCC*, 559 F.2d 830, 833 (D.C.Cir. 1977).

(D.C.Cir. 1995)(Silberman, J., concurring in part and dissenting in part)(“[W]e have traditionally afforded an agency determination whether to grant a waiver of a rule maximum deference.”).

Insofar as appellants contend that the Commission acted unlawfully in failing to designate these applications for an evidentiary hearing, “‘the scope of [the Court’s] review is quite narrow,’ for the ‘Congress intended to vest in the FCC a large discretion to avoid time-consuming hearing in this field whenever possible, and we [should] ordinarily defer to that purpose’” *Hartford Communications Comm. v. FCC*, 467 F.2d 408, 411 (D.C.Cir. 1972), *quoting*, *West Mich. Telecasters, Inc. v. FCC*, 396 F.2d 688, 691 (D.C.Cir. 1968); *Southwestern Operating Co. v. FCC*, 351 F.2d 834, 835 (1965).

II. THE COMMISSION ACTED REASONABLY IN GRANTING A TEMPORARY WAIVER OF THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE.

The Commission’s grant of a temporary waiver of the newspaper/broadcast cross-ownership rule in this case, in the uniquely diverse and competitive New York City market, reflects the application of a safety valve to ensure that the rule does not unnecessarily interfere with these parties’ otherwise lawful business transaction or unfairly impose a forced sale on an applicant where a temporary waiver would not threaten the goals of the rule.

The core of appellants’ arguments that the waiver granted by the Commission here was unlawful is directed at something the Commission did not do – it did not grant Fox’s request for a permanent waiver of the newspaper/broadcast cross-ownership rule nor did it grant the request for an interim waiver pending the outcome of a rule making proceeding. As appellants themselves recognized in their arguments to the Commission, “[t]he burden is ‘considerably heavier’ on a party requesting a permanent waiver and the party must demonstrate ‘highly unusual facts’ or ‘extraordinary circumstances’ in order to be considered for such a waiver.” JA 136, *quoting*

Capital Cities/ABC, Inc., 11 FCC Rcd 5841, 5887 ¶85 (1996); *Fox Television Stations, Inc.*, 8 FCC Rcd at 5348; *see also News America Publishing Co., Inc. v FCC*, 844 F.2d at 803.

Here the Commission granted a temporary waiver to avoid having its rules unnecessarily impede these parties' multiple-station, multiple-market merger where there was no evidence that the goals of the rule were seriously threatened by such a waiver. "In these circumstances, the Commission has granted temporary waivers of its rules, including the television/newspaper restriction, to permit an orderly disposition of assets and avoid forced sales. We have concluded that such transactional accommodation serves that public interest by promoting the free alienability of broadcast properties." *MO&O*, 16 FCC Rcd at 14988 ¶42 (JA 14), *citing Multimedia, Inc.*, 11 FCC Rcd 4883, 4885 (1995); *Stockholders of CBS, Inc.*, 11 FCC Rcd 3733, 3755 (1995).

The Commission pointed out that "this is precisely the type of waiver granted to FTS and Mr. Murdoch in connection with the [earlier] purchase of broadcast television stations owned by *Metromedia Radio and Television, Inc.*" *MO&O*, 16 FCC Rcd at 14988 n.64 (JA 14). An examination of that decision indicates that the Commission's decision to grant a temporary waiver in that case was based on essentially the same reasoning as it followed here. The Commission explained there that a 24-month waiver was appropriate because that period of time "represents a reasonable balance between the policies expressed in the rule and our belief that, in divestiture cases, reasonable accommodations may be made to avoid the risk of distress sales." *See Metromedia Radio & TV, Inc.* 102 F.C.C.2d at 1344 ¶28. Just as the Court found that the Commission's grant of a waiver in *Metromedia* reflected a reasonable weighing of the relevant public

interest considerations on review in that case, the Court should find the Commission's similar determination here reasonable.¹²

When the newspaper/broadcast cross-ownership rule was before it for review in 1977, the Court was aware of the Commission's intent to avoid administering the rule in a manner that would result in a "fire sale" when media properties were required under the rule to be sold. *NCCB v. FCC*, 555 F.2d at 947 n.19. The Court characterized the Commission's statement of its policy against "fire sales" as "an excellent discussion." *Id.* at 966 n.112. This case differs factually in one respect from the cases that were specifically on the Commission's mind when it engaged in that discussion. Here the party that would be the immediate victim of a "fire sale" – Fox – is not an existing cross-owner being required to divest an established combination, but is instead a new licensee, for purposes of this ruling, who is required to divest in order to avoid a new combination. But this factual difference should not obscure fundamental principles common to both situations, namely, that (1) media properties are required under an FCC rule to be sold and (2) the FCC has concluded that the public interest would be served by efforts to prevent those sales from becoming "forced sales" in order "to permit an orderly disposition of assets" in these circumstances. *MO&O*, 16 FCC Rcd at 14988 ¶42 (JA 14).

Appellants do not dispute that New York City is unique in the level of media diversity and competition – they simply claim that it is not as diverse or as competitive as Fox asserted and the Commission found. *See, e.g.*, Br. at 20-24. Moreover, they do not dispute that the *Post*

¹² The Court's opinion affirming the Commission's 1985 action found it unclear from the Commission's decision in *Metromedia* what evidentiary standard the Commission had applied. The Court, however, was able to discern from the Commission's earlier rule making order that the appropriate standard was relatively lenient. *See Health & Medicine Policy Research Group*, 807 F.2d at 1038, 1045 n.7. The Court, emphasizing the "high degree of deference owed by the judiciary to the Commission when it undertakes this sort of function" (*id.* at 1045), thus was able to conclude that even where the evidence in favor of the waiver was "scant" and "nothing to crow about," the Commission's action was reasonable.

has faced significant financial difficulties and is in a vulnerable competitive position – they simply argue that it is not as bad as Fox asserted. Appellants observe, for example, that financial information that Fox submitted showed that the *Post*, since 1993, had “‘steadily increasing revenues and declining losses.’” (Br. at 19 (emphasis added)). Moreover, appellants do not dispute Fox’s statement that despite its commitment and investment, “the *Post* continues to lose money and has slipped in its rankings in the New York market.” [Appl. Exh.4 at 33] JA 75.

Appellants complain further that Fox failed to supply all of the financial information sought by the Commission’s staff. Br. at 18-19. But the staff’s requests were made in the context of Fox’s argument that it was entitled to extend its existing permanent waiver, essentially without any further showing, to permit acquisition of WWOR-TV. As we have noted, that request was denied. In any event, there is ample basis for the Commission’s general judgment that parties being required to divest properties as a result of the newspaper/broadcast cross-ownership rule should be given a reasonable opportunity to make their divestiture to avoid forced sales. As noted above, the agency articulated this policy when it first adopted the rule, and the Court recognized the reasonableness of that approach when it reviewed the rule in 1977.

In fact there can be no serious dispute that diversity and competition are higher in the New York media market than anywhere else in the county – it is a matter virtually capable of judicial notice. Indeed the Court has recognized that the need for concern about diversity and the dangers of concentration of control are greater in smaller than in larger markets. *See Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841, 859-60 (D.C.Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Massachusetts Bay Telecasters v. FCC*, 261 F.2d 55, 64-65 n.24 (D.C.Cir. 1958), *cert. denied*, 366 U.S. 918 (D.C.Cir. 1961). Nevertheless, Fox provided ample basis for the Commission’s conclusion here that neither diversity nor competition would be harmed seriously, if at all, by a 24-month temporary waiver of the newspaper/broadcast cross-ownership rule:

- The New York media marketplace is the country's most competitive and populous, comprising nearly 7 million households and 29 counties spanning portions of New York, New Jersey, Connecticut and Pennsylvania.
- After Fox's acquisition of WWOR-TV, the New York DMA would still be served by 19 independently owned full power television stations.
- The New York DMA is served by over 120 radio stations, eight independently owned cable systems serving 74 percent of the DMA, and numerous other sources of media including direct broadcast satellites and multi-point distribution systems.
- 25 daily newspapers are published in the New York DMA and twelve newspapers for other markets have "spillover" coverage in the New York market.
- The *Post's* circulation reaches only 5.3 percent of the households in the New York DMA and accounts for only 4% of advertising among the top five daily newspapers, ranking it fifth in circulation and advertising.

See JA 71-76, 89-120; see also JA 192-208.

Moreover, the evidence provided by Fox plainly supports the Commission's conclusions that the *Post* was in a clearly non-dominant position in the New York market, had faced a "unique history of significant financial difficulties" and may be in a "vulnerable" competitive position. *MO&O*, 16 FCC Rcd at 14989 ¶45 (JA 15). See, e.g., JA 74-76, 196, 361; FCC Supp. App. 22-32.¹³ It is no doubt true, as appellants claim, that the *Post* is healthier financially now than when the Commission granted a permanent waiver of the rule in 1993 while the *Post* was in bankruptcy. Nevertheless, there is no FCC precedent or policy that requires circumstances to be that dire before a temporary waiver of the rule may be granted. Indeed, as we have noted, it was the Commission's goal to avoid "fire sales" where licensees or applicants will be required to divest media properties to come into compliance with the rule.

¹³ Fox submitted certain information regarding the financial condition of the *Post* to the Commission on a confidential basis pursuant to 47 C.F.R 0.457, 0.459. The Commission issued protective orders regarding these submissions. See *UTV of San Francisco*, 16 FCC Rcd 4807 (MMB 2001)(JA 31); *UTV of San Francisco*, 16 FCC Rcd 5259 (MMB 2001) (JA 33). Because we have not found it necessary to refer to the contents of any of this non-public information directly in this brief, the brief is not being filed under seal. However, we will submit these confidential documents to the Court in a separate appendix under seal.

Appellants rely on the Commission's contemporaneous decision in *Counterpoint Communications, Inc.*, 16 FCC Rcd 15044 (2001), where the agency granted a six-month waiver of the newspaper/broadcast cross-ownership rule, as evidence that the Commission's action here was arbitrary. *See* Br. at 26, 34. In fact, that decision, issued less than ten days after the ruling at issue here, demonstrates the Commission's ability to craft appropriate remedies for differing situations.

Appellants ignore the significantly different circumstances in *Counterpoint* that were highlighted by the Commission itself. The applications at issue there involved the Hartford, Connecticut market. As the Commission noted in *Counterpoint*, it had recently granted Fox a 24-month waiver period "in part because the market involved, New York City, was a highly diverse market. Hartford, however, ranked as the 27th television market in the country, is a substantially less diverse market than New York." *Id.* at 15047 ¶10. The Commission observed that Hartford possessed half as many television stations and one-quarter the number of radio stations as New York City. Moreover, not only did the Hartford market have far fewer daily newspapers than New York City, the newspaper at issue "is the dominant paper in the Hartford market with more than double the circulation of its closest competitor," (*id.*), while the *Post* is the fifth ranked daily in New York City, far behind other papers in both circulation and revenue. *See MO&O*, 16 FCC Rcd at 14988-89 ¶44 (JA 15).

Plainly, the potential harm to diversity and competition was far greater in the circumstances present in Hartford than in New York City and warranted the Commission's conclusion that a "significantly shorter period of time" for a waiver of the newspaper/broadcast cross-ownership rule was appropriate. *Id.* Appellants' discussion of *Counterpoint* simply ignores this distinction and the Commission's discussion and cites that case as if the only relevant consideration

were that it involved a contemporaneous request for waiver of the same rule where the Commission had waived the rule for a significantly shorter period.

Appellants also assert that “a local buyer, Mortimer Zuckerman, has repeatedly indicated a willingness to pay market price for the *Post* and to operate the *Post* as an ‘editorially independent newspaper.’” Br. at 27. Appellants claim this demonstrates the strong financial condition of the *Post* and illustrates that this is “unlike the uncertain situation in 1985.” *Id.* Putting aside the question of how appellants think that acquisition of the *Post* by the owner of the *New York Daily News*, the largest circulation daily newspaper in New York City, would advance either diversity or competition in the New York media market, Mr. Zuckerman’s letter was properly ignored in the Commission’s decision.¹⁴ The five-sentence letter (JA 342), while proclaiming a “serious commitment to the purchase of the New York Post,” is couched with numerous conditions and limitations and provides nothing more than a source for speculation, which was no doubt already evident, about who might be interested in buying the *New York Post* if FCC action were to lead to an immediate forced sale of the paper.¹⁵ The Commission reasonably concluded that “the competitive position of the *Post* may be vulnerable and thus any shorter period of time to come into compliance would run a substantial risk of a forced sale.” *MO&O*, 16 FCC Rcd at 14989 ¶45 (JA 15). The Zuckerman letter raises no serious question about the reasonableness of that judgment.

¹⁴ Fox pointed out to the Commission: “The fact that the owner of a competitive newspaper in the market has expressed a highly conditional interest in acquiring the *New York Post* is irrelevant to News Corp’s request for an interim waiver. Obviously, Mr. Zuckerman would benefit by the elimination of this competition. The Petitioners’ professed concerns for the impact of an interim waiver on the public interest are scarcely alleviated by combination of the *Post* with a competing newspaper and the dismantlement of most of the *Post*’s staff.” JA 362.

¹⁵ Fox had stated that “WWOR-TV is a critical element to the \$5.35 billion acquisition of Chris-Craft. If forced to choose between divesting one of the [television] stations [in New York] and the *Post*, News Corp will sell or shut down the *Post*.” JA 383, *citing* JA 66.

Insofar as petitioners contend that the Commission acted unreasonably in granting a 24-month waiver period as opposed to some lesser period, they have fallen far short of demonstrating that the Commission's judgment was unreasonable. The FCC "has wide discretion to determine where to draw administrative lines," and can be reversed only for abuse of discretion. *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C.Cir. 2000). To prove such abuse, a petitioner must show that "lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem." *Cassell v. FCC*, 154 F.3d 478, 485 (D.C.Cir. 1998) (internal quotations omitted). The Court asks "whether the agency's numbers are within a 'zone of reasonableness,' not whether its numbers are precisely right." *Hercules Inc. v. EPA*, 598 F.2d 91, 107-108 (D.C. Cir. 1978).

Indeed, in reviewing the Commission's 1985 decision in *Metromedia*, the Court rejected a similar claim that even if the Commission's waiver of the newspaper/broadcast cross-ownership rule may have been appropriate, 24 months was too long. The Court held: "[I]n determining whether a 6, 12, or 24 month period is appropriate, the Commission is engaging in classic "line- drawing," making judgments to which this court must generally defer. . . . We will not disturb the Commission's determination that 24 months was an appropriate period, in the absence of evidence as to why a shorter period would have achieved the same goals sought by the Commission in granting the waiver." *Health & Medicine Policy Research*, 807 F.2d at 1045 n.10, citing *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1031 (D.C.Cir.1981) and *FCC v. WNCN Listeners Guild*, 450 U.S. at 596.

A fair examination of the Commission's action here reveals that its decision to allow Fox 24 months to bring its operations in New York into compliance with the newspaper/broadcast cross-ownership rule is within the zone of reasonableness:

- as we have discussed above, the Commission had previously granted Fox a temporary 24-month waiver of the rule involving the same newspaper and the same market, which was affirmed by the Court;
- the record here reflected no harm to competition or diversity in the New York City market in the eight years that Fox had owned WNYW(TV) and the *Post* as a result of the Commission's 1993 permanent waiver;¹⁶
- the Commission had granted a number of other waivers of the rule ranging from 6 to 36 months in length;¹⁷
- the record demonstrated that while Fox had made significant investments in the *Post* it continued to incur losses, was far from dominant in either circulation or advertising revenues and faced stiff competition from other daily newspapers.¹⁸

Finally, appellants' charge that the "Commission granted Fox a two-year waiver with the express understanding that the rule would likely be modified or repealed sometime in the next two years" (Br. at 28) is at odds with the actual terms of the agency's order. What the Commission said was that "[w]e are simply requiring that FTS be in compliance with our television/newspaper cross-ownership rule within 24 months from consummation of the transaction If our rules should change during that period to permit the proposed combination, then FTS and Murdoch will not need to divest the *Post* or one of the television stations to come into compli-

¹⁶ Fox pointed out that "'a substantial record already exists.' Here, the Commission has a substantial record on the New York market from the prior permanent waiver proceeding and has had nearly seven years to observe and assess the actual impact of the WNYW/*New York Post* combination on competition and viewpoint diversity in the New York market." JA 206.

¹⁷ In a filing with the Commission, Fox pointed to fourteen other instances in which the Commission had granted temporary waivers of the newspaper/broadcast cross-ownership rule for periods ranging from six months to thirty-six months. See [*News Corp. Ltr of 5/11/01*] JA 382. See *Chancellor Media/Shamrock Radio Licenses*, 15 FCC Rcd 17053 (2000); *Renaissance Communications Corp.*, 12 FCC Rcd 11866 (1997), *aff'd*, *Tribune v. FCC*, 133 F.3d 61 (D.C. Cir. 1998); *WDRO, Inc.*, 12 FCC Rcd 11671 (1997); *New City Communications, Inc.*, 12 FCC Rcd 3929 (1997); *Combined Communications Corp.*, 12 FCC Rcd 1287 (Vid.Serv.Div. 1997); *WHOA-TV, Inc.*, 11 FCC Rcd 20041 (1996); *Stauffer Amarillo Radio Trust*, 11 FCC Rcd 14865 (1996); *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841 (1996); *Multi-media, Inc.*, 11 FCC Rcd 4883 (1995); *Stauffer Communications, Inc.*, 10 FCC Rcd 5165 (1995); *Twentieth Holdings Corp.*, 1 FCC Rcd 1201 (1986); *Golden West Assoc., L.P.*, 59 Radio Reg.2d (P&F) 125 (1985); *Metromedia Radio & Television, Inc.*, 102 F.C.C.2d 1334; *Crosby N. Boyd*, 57 F.C.C.2d 475 (1975).

¹⁸ See *MO&O*, 16 FCC Rcd at 14989 ¶45 (JA 15); see also JA 74-76, 196, 361; FCC Supp. App. 1, 16, 22.

ance.” *MO&O*, 16 FCC Rcd at 14989 n.73 (JA 15). The only “express understanding” is that if the rule should change prior to the expiration of the waiver such that common ownership of a newspaper and broadcast stations as temporarily permitted by the waiver is no longer prohibited by rule, no divestiture will be required – a fairly unexceptional proposition. The rule may be repealed, modified or retained in the pending rule making proceeding, and that action may take place before or after the temporary waiver granted in this case expires. Appellants cite nothing to support their claim that there is any “express understanding” about the outcome of that proceeding. Appellants’ suggestion that the result in that proceeding, when and whatever it may be, has any bearing on the reasonableness of the Commission’s action granting Fox a temporary waiver of the rule in this case is baseless.

***III. THE COMMISSION ACTED WITHIN ITS
DISCRETION IN DECLINING TO DESIGNATE THESE
APPLICATIONS FOR AN EVIDENTIARY HEARING.***

The Commission acted properly when it decided that there was no need for an evidentiary hearing in this case. Section 309(d) of the Communications Act, 47 U.S.C. 309(d), states precise standards for designating an application such as the ones at issue here for hearing: “[T]he hearing requirement ... is triggered in one of two ways.” *United States v. FCC*, 652 F.2d 72, 88 (D.C.Cir. 1980)(*en banc*). Either a “substantial and material question of fact” supported by affidavit of a someone with personal knowledge of the facts alleged must be “presented” that contains “specific allegations of fact sufficient to show ... that a grant of the application would be *prima facie* inconsistent with the [public interest]” or there must be insufficient information for the Commission to be “[]able to make a finding” as to “whether the public interest, convenience and necessity will be served by the granting of [the] application.” 47 U.S.C. 309(a), (d)(1), (e); *see United States v. FCC*, 652 F.2d at 88-89; *Tele-Media Corp. v. FCC*, 697 F.2d 402, 409 (D.C.Cir. 1983).

The law is clear that, “the decision of whether or not hearings are necessary or desirable is a matter in which the Commission’s discretion and expertise is paramount.” *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 324 (D.C.Cir. 1974). As we have noted, “Congress intended to vest in the FCC a large discretion to avoid time-consuming hearings in this field whenever possible. ... *Southwestern Operating Co.*, 351 F.2d at 835; *see also Health & Medicine Policy Research*, 807 F.2d at 1045 n.10. The Commission reasonably exercised that discretion here.

Again, the Court’s decision in *Health & Medicine Policy Research* is instructive. The Court rejected arguments that the Commission erred in not conducting an evidentiary hearing. The Court held that the contention of appellants there that they had presented a “substantial and material question of fact was “in reality, merely the flip side of their contention that Fox made an inadequate showing to qualify for a waiver.” *Health & Medicine Policy Research*, 807 F.2d at 1045 n.10. Recognizing the “substantial deference” owed the Commission’s judgment about such matters, the Court found that “reversal of the FCC’s determination not to hold a hearing is painfully inappropriate.” *Id.* Much the same is true here. Appellants’ contention in this case that the Commission was required to hold an evidentiary hearing before it could grant Fox’s application is inextricably intertwined with appellants’ argument that Fox had not justified a waiver of the newspaper/broadcast cross-ownership rule. As we have shown above, the Commission acted reasonably in granting a temporary waiver of that rule. That discussion also largely answers appellants charges concerning the requirement for hearing.

Specifically, appellants’ claim (Br. at 29) that they presented “concrete factual assertions” which, if “assumed true, show the overall transaction violated four broadcast ownership rules” both misses the point and is difficult to square with the record on which they rely. It was no great feat to demonstrate that grant of the applications violated ownership rules – their grant

obviously violated several rules. That was why Fox sought a waiver of those rules.¹⁹ The question is whether appellants' filings below presented any substantial question concerning the grounds upon which the Commission granted a temporary waiver of the newspaper/broadcast cross-ownership rule that required resolution in an evidentiary hearing.

Appellants point to three areas: First, they contend that the Commission did not resolve questions raised by the Commission's staff in two letters of inquiry to Fox. Br. at 30-31. As we have noted, those staff inquiries (JA 259, 306) were made in the context of Fox's request for permanent waiver of the rule or for an interim waiver of indeterminate duration, which the Commission resolved by denying those requests. Moreover, one of the letters focused primarily on corporate control issues to which Fox responded in detail. The Commission discussed the matter at length in its order, and appellants do not raise that matter as an issue on appeal. *See MO&O*, 16 FCC Rcd at 14977-80 ¶¶8-19 (JA 3-6); *see* n. 6 above. The other issues involved financial information about the *Post* and the need for the applicants to provide an explicit public interest showing over and above the information required on the standard assignment application forms. Fox provided financial information that was sufficient to satisfy the Commission and, as discussed above, there was ample basis in the record regarding the *Post*'s financial condition and the competitive circumstances it faces in New York to support the Commission's judgment that a temporary 24-month waiver was appropriate. Finally, we explain below that in the circumstances of broadcast station assignment applications Fox was correct that no separate explicit public interest showing is required of applicants who submit information required by the Commission's

¹⁹ It is, moreover, unclear why any rule other than the newspaper/broadcast cross-ownership rule is relevant at this point since appellants do not claim that the Commission's grant of temporary waivers of other rules was unlawful.

applications and propose eventual compliance with applicable Commission rules and policies.

See p. 28 below.

Second, appellants assert that the Commission's "fail[ure] to follow up when Fox refused to allow the Bureau to examine documents submitted to the U.S. Department of Justice ("DOJ") regarding its Hart-Scott-Rodino compliance" presented questions concerning the impact of the proposed merger on media diversity and competition in the New York market that was required to be explored in an evidentiary hearing. Br. at 31. Whether those documents would even be relevant to the Commission's action on the newspaper/broadcast cross-ownership rule waiver is open to question.²⁰ However, even if they might contain relevant information, appellants fail completely to demonstrate why Fox's decision not to waive the confidentiality to permit the Commission to examine those documents presented a question that was required to be explored in an evidentiary hearing. The issue is whether there is basis in the record for the Commission's decision. That there may be other "relevant" information the Commission did not examine is immaterial unless there is some threshold showing that that information would raise a substantial question about the Commission's decision. Appellants make no such claim.

Finally, appellants charge that "when the Bureau requested information as to how the transaction would serve the public interest, Fox bluntly stated that it need not do so, brushing aside the Bureau's statement that it required the information to fulfill its duty under the Communications Act." Br. at 31. This overlaps appellants' claim referred to above regarding the Commission's alleged failure to resolve issues raised in the two staff letters to Fox. Moreover, as

²⁰ Fox asserted, in declining to waive the confidentiality of those documents, that "the principal thrust of the DOJ's HSR review concerned the competitive effects, if any, of the creation of duopolies in New York, Los Angeles, Phoenix, and Salt Lake City on spot advertising in those markets." JA 273. This characterization is consistent with the Department of Justice's description of its action that led to a consent decree. *See* JA 340.

we discuss in the next section, this characterization is a serious distortion of Fox's position. *See* n. 22 below. To the extent that appellants' claim is that a hearing was required to resolve whether grant of the applications was in the public interest, we also explain in the following section that where the Commission has adopted extensive regulations in an area and requires applicants to provide specific information on an application form, the Commission can reasonably conclude that completion of the application and compliance with the rules provides sufficient basis for a determination that the public interest would be served by grant of the application without requiring further specific, ad hoc showings. In this respect, appellants' apparent claim that an evidentiary hearing was required to examine whether Fox had demonstrated that the public interest would be served by grant of the applications is mistaken.

***IV. THE COMMISSION ADEQUATELY EXPLAINED
ITS CONCLUSION THAT THE PUBLIC INTEREST WOULD
BE SERVED BY GRANT OF THESE APPLICATIONS.***

Echoing the dissenting Commissioners, appellants contend that the Commission failed to explain adequately its conclusion that the public interest would be served by grant of these applications. Br. at 33. In fact, the Commission's explanation of its public interest determination was at least adequate under both the Communications Act and the APA. Appellants' argument is flawed because it is based on the belief that an applicant's mere compliance with existing Commission rules and policies alone is not sufficient basis for the Commission's grant of an assignment application. Petitioners contend, relying on Commissioner Tristani's dissenting statement, that the agency may not lawfully grant an assignment application without determining "whether the transaction would substantially frustrate' the Communications Act'" and "whether the transaction promises to yield affirmative public interest benefits," even if the application demon-

strates no conflict with existing Commission rules or policies. Br. at 34, *quoting MO&O*, 16 FCC Rcd at 15000 (JA 26) (Comm'r Tristani dissenting).²¹

It is true, as Chairman Powell observed in his separate statement, that there are some areas of Commission regulation where the agency has not set out specific rules defining the public interest, and it must make more case-specific determinations. However, the “extensive rulemaking proceedings used to develop the broadcast ownership rules take full account of the Commission's diversity goals and concentration concerns. These rules squarely embody the Commission’s public interest goals of limiting the effect of market power and promoting diversity of viewpoints in the market. A transaction that complies with structural rules designed to advance the public interest (when they exist), should not be subject to further ad hoc review; otherwise the exalted benefits of such rules would be eviscerated.” *MO&O*, 16 FCC Rcd at 14995 (JA 21) (Separate statement of Chm. Powell).

This approach is, of course, consistent with the well-established proposition that “the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion.” *Cassell v. FCC*, 154 F.3d 478, 486 (1998), *quoting*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), and *citing* *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). When the agency has chosen to act by rule making, as it has here with respect to defining what constitutes the public interest when considering broadcast applications, it is not unreasonable for the agency to conclude that proposed compliance with those rules is sufficient basis for grant of an applica-

²¹ Commissioner Tristani stated explicitly: “I cannot agree that mere compliance with existing rules satisfies the public interest.” 16 FCC Rcd at 15001 (JA 27).

tion.²² As this Court has explained previously, in rejecting a similar argument also made by a petitioner to deny an assignment application,

[o]ver the years, the FCC has developed a form on which it solicits the information it requires in order to discharge its statutory responsibilities. Specifically, the parties who propose to assign a broadcast station license pursuant to section 310(d) must apply for FCC approval on FCC Form 314, On this form, a proposed assignee must disclose its corporate structure, any alien control, adverse decisions against it in various judicial and administrative proceedings, other media interests held by it or any other party to the assignment, as well as other information the Commission considers relevant in determining whether the proposed assignment will serve the public interest, convenience, and necessity.
...

By requiring a proposed assignee to address the relevant facets of the public interest, convenience, and necessity on FCC Form 314, the Commission has incorporated the consideration of these issues into its application process. Therefore, the FCC's approval of WEAM's application implies a finding on ample information that the public interest will be served by the assignment.

Committee To Save WEAM v. FCC, 808 F.2d 113, 118 (D.C.Cir. 1986); *cf. AT&T Co. v. FCC*, 539 F.2d 767, 774 (D.C.Cir. 1976) (“[T]he Commission may obviate the need for repetitious hearings on previously considered issues of public policy by establishing, through rulemaking, criteria against which to judge specific applications. ... ‘Though the Commission said it would pass separately upon the merits of each pending application, presumably the rule would govern individual cases. That is its function.’”).

Having reasonably concluded that Fox should be granted temporary waivers to comply with the newspaper/broadcast cross-ownership rule, as well as two other rules about which appellants do not complain, it was proper for the agency, in the absence of incompleteness of the applications or other basis to find the proposed transaction inconsistent with FCC rules or

²² Appellants' claim that Fox “bluntly stated that it need not” supply information demonstrating that grant of the applications would serve the public interest is incorrect and misleading. Br. at 31 Fox argued in its pleadings before the Commission that “in the extensively regulated broadcast area, there is no requirement that applicants make an affirmative public interest showing above and beyond the information solicited by the relevant FCC Form.” JA 266 (emphasis added); *see also* JA 210-13.

policies, to grant the applications without making any additional determination whether such grant otherwise serves the public interest. As the Commission's Chairman observed:

[I]n multiple-station, multiple market transactions, it is common for the combined entity to create temporary violations of our ownership rules. Consistent with Commission precedent, however, the *Order* balances the grant of a compliance period, against any potential harm to the goals underlying the rule. Beyond this detailed analysis, engaging in an additional, more subjective, evaluation using some ambiguous standard is unnecessarily complex and redundant. This additional burden places more weight on a review process that is already laboring under the demands of a fast-paced, innovation-driven marketplace.

MO&O, 16 FCC Rcd at 14998 (JA 29).

CONCLUSION

For the foregoing reasons, the Court should affirm the Commission's order.

Respectfully Submitted,

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August 19, 2002

STATUTORY APPENDIX

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UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER III--SPECIAL PROVISIONS RELATING TO RADIO
PART I--GENERAL PROVISIONS

Current through P.L. 107-200, approved 7-23-02

§ 309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Time of granting application

Except as provided in subsection (c) of this section, no such application--

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(B) aeronautical en route stations,

(C) aeronautical advisory stations,

(D) airdrome control stations,

(E) aeronautical fixed stations, and

(F) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Applications not affected by subsection (b)

Subsection (b) of this section shall not apply--

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for--

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) of this title or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(c) of this title where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a) of this title.

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall proceed as provided in subsection (e) of this section.

* * * * *

§ 310. License ownership restrictions

(a) Grant to or holding by foreign government or representative

The station license required under this chapter shall not be granted to or held by any foreign government or the representative thereof.

(b) Grant to or holding by alien or representative, foreign corporation, etc.

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by--

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(c) Authorization for aliens licensed by foreign governments; multilateral or bilateral agreement to which United States and foreign country are parties as prerequisite

In addition to amateur station licenses which the Commission may issue to aliens pursuant to this chapter, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of Title 5 shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

(d) Assignment and transfer of construction permit or station license

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

(e) Administration of regional concentration rules for broadcast stations

(1) In the case of any broadcast station, and any ownership interest therein, which is excluded from the regional concentration rules by reason of the savings provision for existing facilities provided by the First Report and Order adopted March 9, 1977 (docket No. 20548; 42 Fed. Reg. 16145), the exclusion shall not terminate solely by reason of changes made in the technical facilities of the station to improve its service.

(2) For purposes of this subsection, the term "regional concentration rules" means the provisions of sections 73.35, 73.240, and 73.636 of title 47, Code of Federal Regulations (as in effect June 1, 1983), which prohibit any party from directly or indirectly owning, operating, or controlling three broadcast stations in one or several services where any two of such stations are within 100 miles of the third (measured city-to-city), and where there is a primary service contour overlap of any of the stations.

* * * * *

**UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 7--JUDICIAL REVIEW**

Current through P.L. 107-200, approved 7-23-02

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL
COMMUNICATIONS COMMISSION
SUBCHAPTER A--GENERAL
PART 0--COMMISSION ORGANIZATION
SUBPART C--GENERAL INFORMATION
PUBLIC INFORMATION AND
INSPECTION OF RECORDS**

Current through July 1, 2002; 67 FR 44347

§ 0.457 Records not routinely available for public inspection.

The records listed in this section are not routinely available for public inspection. The records are listed in this section by category, according to the statutory basis for withholding those records from inspection; and under each category, if appropriate, the underlying policy considerations affecting the withholding and disclosure of records in that category are briefly outlined. Except where the records are not the property of the Commission or where the disclosure of those records is prohibited by law, the Commission will entertain requests from members of the public under § 0.461 for permission to inspect particular records withheld from inspection under the provisions of this section, and will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in the light of the facts of the particular case. In making such requests, it is important to appreciate that there may be more than one basis for withholding particular records from inspection. The listing of records by category is not intended to imply the contrary but is solely for the information and assistance of persons making such requests. Requests to inspect or copy the transcripts, recordings or minutes of agency or advisory committee meetings will be considered under § 0.603 rather than under the provisions of this section.

(a) Materials that are specifically authorized under criteria established by Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly

classified pursuant to such Executive Order, 5 U.S.C. 552(b)(1).

(1) E.O. 10450, "Security Requirements for Government Employees," 18 FR 2489, April 27, 1953, 3 CFR, 1949-1953 Comp., p. 936. Pursuant to the provisions of E.O. 10450, reports and other material and information developed in security investigations are the property of the investigative agency. If they are retained by the Commission, it is required that they be maintained in confidence and that no access be given to them without the consent of the investigative agency. Such materials and information will not be made available for public inspection. See also paragraphs (f) and (g) of this section.

(2) E.O. 10501, "Safeguarding Official Information in the Interests of the Defense of the United States," 18 FR 7049, November 10, 1953, as amended, 3 CFR, 1965 ed., p. 450. E.O. 10501, as amended, provides for the classification of official information which requires protection in the interests of national defense, and prohibits the disclosure of classified information except as provided therein. Classified materials and information will not be made available for public inspection. See also, E.O. 10033, February 8, 1949, 14 FR 561, 3 CFR, 1949-1953 Comp., p. 226, and 47 U.S.C. 154(j).

(b) Materials that are related solely to the internal personnel rules and practices of the Commission, 5 U.S.C. 552(b)(2).

(1) Materials related solely to internal management matters, including minutes of Commission actions on such matters. Such materials may be made available for inspection under § 0.461, however, unless their disclosure would interfere with or prejudice the performance of the internal management functions to which they relate, or unless their disclosure would constitute a clearly unwarranted invasion of personal privacy (see paragraph (f) of this section).

(2) Materials relating to the negotiation of contracts.

(3) All materials used in conducting radio operator examinations, including test booklets, Morse Code tapes, and scoring masks.

(c) Materials that are specifically exempted from disclosure by statute (other than the Government in the Sunshine Act, 5 U.S.C. 552b): Provided, That such statute (1) requires that the materials be withheld from the public in such a manner as to leave no discretion on the issue, or (2) establishes particular criteria for withholding or refers to particular types of materials to be withheld. The Commission is authorized under the following statutory provisions to withhold materials from public inspection.

(1) Section 4(j) of the Communications Act, 47 U.S.C. 154(j), provides, in part, that, "The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense." Pursuant to that provision, it has been determined that the following materials should be withheld from public inspection (see also paragraph (a) of this section):

(i) Maps showing the exact location of submarine cables.

(ii) Minutes of Commission actions on classified matters.

(iii) Maps of nation-wide point-to-point microwave networks.

(2) Under section 213(f) of the Communications Act, 47 U.S.C. 213(f), the Commission is authorized to order, with the reasons therefor, that records and data pertaining to the valuation of the property of common carriers and furnished to the Commission by the carriers pursuant to the provisions of that section, shall not be available for public inspection. If such an order has been issued, the data and records will be withheld from public inspection, except under the provisions of § 0.461. Normally, however,

such data and information is available for inspection. See § 0.455(c)(8).

(3) Under section 412 of the Communications Act, 47 U.S.C. 412, the Commission may withhold from public inspection certain contracts, agreements and arrangements between common carriers relating to foreign wire or radio communication. Reports of negotiations regarding such foreign communication matters, filed by carriers under § 43.52 of this chapter, may also be withheld from public inspection under section 412. Any person may file a petition requesting that such materials be withheld from public inspection. To support such action, the petition must show that the contract, agreement or arrangement relates to foreign wire or radio communications; that its publication would place American communication companies at a disadvantage in meeting the competition of foreign communication companies; and that the public interest would be served by keeping its terms confidential. If the Commission orders that such materials be kept confidential, they will be made available for inspection only under the provisions of § 0.461.

(4) Section 605 of the Communications Act, 47 U.S.C. 605, provides, in part, that, "no person not being authorized by the sender shall intercept any communication [by wire or radio] and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person." In executing its responsibilities, the Commission regularly monitors radio transmissions (see § 0.116). Except as required for the enforcement of the communications laws, treaties and the provisions of this chapter, or as authorized in section 605, the Commission is prohibited from divulging information obtained in the course of these monitoring activities; and such information, and materials relating thereto, will not be made available for public inspection.

(5) Section 1905 of the Criminal Code, 18 U.S.C. 1905, prohibits the unauthorized disclosure of certain confidential information. See paragraph (d) of this section.

(d) Trade secrets and commercial or financial information obtained from any person and privileged or confidential-categories of materials not routinely available for public inspection, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905.

(1) The materials listed in this subparagraph have been accepted, or are being accepted, by the Commission on a confidential basis pursuant to 5 U.S.C. 552(b)(4). To the extent indicated in each case, the materials are not routinely available for public inspection. If the protection afforded is sufficient, it is unnecessary for persons submitting such materials to submit therewith a request for non-disclosure pursuant to § 0.459. A persuasive showing as to the reasons for inspection will be required in requests for inspection of such materials submitted under § 0.461.

(i) Financial reports submitted by licensees of broadcast stations pursuant to former § 1.611 or by radio or television networks are not routinely available for inspection.

(ii) Applications for equipment authorizations (type acceptance, type approval, certification, or advance approval of subscription television systems), and materials relating to such applications, are not routinely available for public inspection prior to the effective date of the authorization. The effective date of the authorization will, upon request, be deferred to a date no earlier than that specified by the applicant. Following the effective date of the authorization, the application and related materials (including technical specifications and test measurements) will be made available for inspection upon request (See § 0.460). Portions of applications for equipment certification of scanning receivers and related materials will not be made available for inspection. This information includes that necessary to prevent modification of scanning receivers to receive Cellular Service frequencies, such as schematic diagrams, technical narratives describing equipment operation, and relevant design details.

(iii) Information submitted in connection with audits, investigations and examination of records pursuant to 47 U.S.C. 220.

(iv) Programming contracts between programmers and multichannel video programming distributors.

(v) Prior to July 4, 1967, the rules and regulations provided that certain materials submitted to the Commission would not be made available for public inspection or provided assurance, in varying degrees, that requests for nondisclosure of certain materials would be honored. See, e.g., 47 CFR chapter I revised as of October 1, 1966, §§ 0.417, 2.557, 5.204, 5.255, 15.70, 21.406, 80.33, 87.153, 89.215, 91.208, 91.605 and 93.208. Materials submitted under these provisions are not routinely available for public inspection. To the extent that such materials were accepted on a confidential basis under the then existing rules, they are not routinely available for public inspection. The rules cited in this paragraph (d)(1)(v) were superseded by the provisions of this paragraph (d), effective July 4, 1967. Equipment authorization information accepted on a confidential basis between July 4, 1967 and March 25, 1974, will not be routinely available for inspection and a persuasive showing as to the reasons for inspection of such information will be required in requests for inspection of such materials submitted under § 0.461.

(vi) The rates, terms and conditions in any agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S. international traffic, including the method for allocating return traffic, if the U.S. international route is exempt from the international settlements policy under § 43.51(e)(3) of this Chapter.

(2) Unless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, it is important for any person who submits materials which he wishes withheld from public inspection under 5 U.S.C. 552(b)(4) to submit therewith a request for non-disclosure pursuant

to § 0.459. If it is shown in the request that the materials contain trade secrets or commercial, financial or technical data which would customarily be guarded from competitors, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under § 0.461. In the absence of a request for non-disclosure, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection. Ordinarily, however, in the absence of such a request, materials which are submitted will be made available for inspection upon request pursuant to § 0.461, even though some question may be present as to whether they contain trade secrets or like matter.

(e) Interagency and intra-agency memorandums or letters, 5 U.S.C. 552(b)(5). Interagency and intra-agency memorandums or letters and the work papers of members of the Commission or its staff will not be made available for public inspection, except in accordance with the procedures set forth in § 0.461. Only if it is shown in a request under § 0.461 that such a communication would be routinely available to a private party through the discovery process in litigation with the Commission will the communication be made available for public inspection. Normally such papers are privileged and not available to private parties through the discovery process, since their disclosure would tend to restrain the commitment of ideas to writing, would tend to inhibit communication among Government personnel, and would, in some cases, involve premature disclosure of their contents.

(f) Personnel, medical and other files whose disclosure would constitute a clearly unwarranted invasion of personal privacy, 5 U.S.C. 552(b)(6).

(1) Under Executive Order 10561, 19 FR 5963, September 13, 1954, 3 CFR 1954-1958 Comp., page 205, the Commission maintains an Official

Personnel Folder for each of its employees. Such folders are under the jurisdiction and control, and are a part of the records, of the U.S. Office of Personnel Management. Except as provided in the rules of the Office of Personnel Management (5 CFR 294.701-294.703), such folders will not be made available for public inspection by the Commission. In addition, other records of the Commission containing private, personal or financial information concerning particular employees will be withheld from public inspection.

(2) [Reserved]

(3) Information submitted to the Commission by applicants for commercial radio operator licenses concerning the character and mental or physical health of the applicant is available for inspection only under procedures set forth in § 0.461. Except in this respect, or where other aspects of a similar private nature warrant nondisclosure, commercial radio operator application files are available for inspection.

(g) Investigatory records compiled for law enforcement purposes, to the extent that production of such records would:

(1) Interfere with enforcement proceedings;

(2) Deprive a person of a right to fair trial or an impartial adjudication;

(3) Constitute an unwarranted invasion of personal privacy;

(4) Disclose the identity of a confidential source;

(5) Disclose investigative techniques or procedures; or

(6) Endanger the life or physical safety of law enforcement personnel, 5 U.S.C. 552(b)(7).

§ 0.459 Requests that materials or information submitted to the Commission be withheld from public inspection.

(a) Any person submitting information or materials to the Commission may submit therewith a request that such information not be made routinely available for public inspection. (If the materials are specifically listed in § 0.457, such a request is unnecessary.) A copy of the request shall be attached to and shall cover all of the materials to which it applies and all copies of those materials. If feasible, the materials to which the request applies shall be physically separated from any materials to which the request does not apply; if this is not feasible, the portion of the materials to which the request applies shall be identified.

(b) Each such request shall contain a statement of the reasons for withholding the materials from inspection (see § 0.457) and of the facts upon which those records are based, including:

(1) Identification of the specific information for which confidential treatment is sought;

(2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;

(4) Explanation of the degree to which the information concerns a service that is subject to competition;

(5) Explanation of how disclosure of the information could result in substantial competitive harm;

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure;

(7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

(c) Casual requests which do not comply with the requirements of paragraphs (a) and (b) of this section will not be considered.

(d)(1) The Commission may defer acting on requests that materials or information submitted to the Commission be withheld from public inspection until a request for inspection has been made pursuant to § 0.460 or § 0.461. The information will be accorded confidential treatment, as provided for in § 0.459(g) and § 0.461, until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted. If a response in opposition to a confidentiality request is filed, the party requesting confidentiality may file a reply.

(2) Requests which comply with the requirements of paragraphs (a) and (b) of this section will be acted upon by the appropriate Bureau or Office Chief, who is directed to grant the request if it presents by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the Freedom of Information Act, 5 U.S.C. 552. If the request is granted, the ruling will be placed in the public file in lieu of the materials withheld from public inspection. A copy of the ruling shall be forwarded to the General Counsel.

(e) If the materials are submitted voluntarily (i.e., absent any direction by the Commission), the person submitting them may request the Commission to return the materials without

consideration if the request for confidentiality should be denied. In that event, the materials will ordinarily be returned (e.g., an application will be returned if it cannot be considered on a confidential basis). Only in the unusual instance where the public interest so requires will the materials be made available for public inspection. However, no materials submitted with a request for confidentiality will be returned if a request for inspection is filed under § 0.461. If submission of the materials is required by the Commission and the request for confidentiality is denied, the materials will be made available for public inspection.

(f) If no request for confidentiality is submitted, the Commission assumes no obligation to consider the need for non-disclosure but, in the unusual instance, may determine on its own motion that the materials should be withheld from public inspection. See § 0.457(g).

(g) If a request for confidentiality is denied, the person who submitted the request may, within 5 working days, file an application for review by the Commission. If the application for review is denied, the person who submitted the request will be afforded 5 working days in which to seek a judicial stay of the ruling. If these periods

expire without action by the person who submitted the request, the materials will be returned to the person who submitted them or will be placed in a public file. Notice of denial and of the time for seeking review or a judicial stay will be given by telephone, with follow-up notice in writing. The first day to be counted in computing the time periods established in this subsection is the day after the date of oral notice. Materials will be accorded confidential treatment, as provided in § 0.459(g) and § 0.461, until the Commission acts on any timely applications for review of an order denying a request for confidentiality, and until a court acts on any timely motion for stay of such an order denying confidential treatment.

(h) If the request is granted, the status of the materials is the same as that of materials listed in § 0.457. Any person wishing to inspect them may submit a request for inspection under § 0.461.

(i) Third party owners of materials submitted to the Commission by another party may participate in the proceeding resolving the confidentiality of the materials.

**CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL
COMMUNICATIONS COMMISSION
SUBCHAPTER C--BROADCAST RADIO
SERVICES
PART 73--RADIO BROADCAST
SERVICES
SUBPART H--RULES APPLICABLE TO
ALL BROADCAST STATIONS**

Current through July 1, 2002; 67 FR 44347

§ 73.3555 Multiple ownership.

(a)(1) Radio contour overlap rule. No license for an AM or FM broadcasting station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the principal community contour of that station and the principal community contour of any other broadcasting station directly or indirectly owned, operated, or controlled by the same party, except that such license may be granted in connection with a transfer or assignment from an existing party with such interests, or in the following circumstances:

(i) In a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(iv) In a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio

stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

(2) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

(3) For purposes of this paragraph (a):

(i) The "principal community contour" for AM stations is the predicted or measured 5mV/m groundwave contour computed in accordance with § 73.183 or § 73.186 and for FM stations is the predicted 3.16 mV/m contour computed in accordance with § 73.313.

(ii) The number of stations in a radio market is the number of commercial stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations in question (i.e., the station for which an authorization is sought and any station in the same service that would be commonly owned whose principal community contour overlaps the principal community contour of that station). In addition, if the area of overlap between the stations in question is overlapped by the principal community contour of a commonly owned station or stations in a different service (AM or FM), the number of stations in the market includes stations whose principal community contours overlap the principal community contours of such commonly owned station or stations in a different service.

(b) Local television multiple ownership rule. An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) only under one or more of the following conditions:

(1) The Grade B contours of the stations (as determined by § 73.684 of this part) do not

overlap; or

(2)(i) At the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9:00 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) At least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. Count only those stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination. In areas where there is no Nielsen DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination.

(c) Radio-television cross ownership rule.

(1) This rule is triggered when:

(i) The predicted or measured 1 mV/m contour of an existing or proposed FM station (computed in accordance with § 73.313 of this part) encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompasses the entire community of license of the FM station; or

(ii) The predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station (computed in accordance with § 73.183 or § 73.386), encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast

station(s) (computed in accordance with § 73.684) encompass(es) the entire community of license of the AM station.

(2) An entity may directly or indirectly own, operate, or control up to two commercial TV stations (if permitted by paragraph (b) of this section, the local television multiple ownership rule) and 1 commercial radio station situated as described above in paragraph (1) of this section. An entity may not exceed these numbers, except as follows:

(i) If at least 20 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to:

(A) Two commercial TV and six commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule); or

(B) One commercial TV and seven commercial radio stations (to the extent that an entity would be permitted to own two commercial TV and six commercial radio stations under paragraph (c)(2)(i)(A) of this section, and to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(ii) If at least 10 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to two commercial TV and four commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(3) To determine how many media voices would remain in the market, count the following:

(i) TV stations: independently owned and operating full-power broadcast TV stations within the DMA of the TV station's (or stations') community (or communities) of license that have Grade B signal contours that overlap with the Grade B signal contour(s) of the TV station(s) at issue;

(ii) Radio stations:

(A)(1) Independently owned operating primary broadcast radio stations that are in the radio metro market (as defined by Arbitron or another nationally recognized audience rating service) of:

(i) The TV station's (or stations') community (or communities) of license; or

(ii) The radio station's (or stations') community (or communities) of license; and

(2) Independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron or another nationally recognized audience rating service.

(B) When a proposed combination involves stations in different radio markets, the voice requirement must be met in each market; the radio stations of different radio metro markets may not be counted together.

(C) In areas where there is no radio metro market, count the radio stations present in an area that would be the functional equivalent of a radio market.

(iii) Newspapers: English-language newspapers that are published at least four days a week within the TV station's DMA and that have a circulation exceeding 5% of the households in the DMA; and

(iv) One cable system: if cable television is generally available to households in the DMA. Cable television counts as only one voice in the DMA, regardless of how many individual cable systems operate in the DMA.

(d) Daily newspaper cross-ownership rule. No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:

(1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published; or

(2) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or

(3) The Grade A contour of a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(e)(1) National television multiple ownership rule. No license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in TV stations which have an aggregate national audience reach exceeding thirty-five (35) percent.

(2) For purposes of this paragraph (e):

(i) National audience reach means the total number of television households in the Nielsen Designated Market Area (DMA) markets in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation.

(f) The ownership limits of this section are not applicable to noncommercial educational FM and noncommercial educational TV stations.

However, the attribution standards set forth in the Notes to this section will be used to determine attribution for noncommercial educational FM and TV applicants, such as in evaluating mutually exclusive applications pursuant to subpart K.

Note 1 to § 73.3555: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2 to § 73.3555: In applying the provisions of this section, ownership and other interests in broadcast licensees, cable television systems and daily newspapers will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper will be cognizable;

(b) Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper, or if any of the officers or directors of the broadcast licensee, cable television system or daily newspaper are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(c) Attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for

each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. For purposes of paragraph (i) of this note, attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening organizations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, and the ownership percentage for any link in the chain that exceeds 50% shall be included for purposes of this multiplication. [For example, except for purposes of paragraph (i) of this note, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee," then X's interest in "Licensee" would be 25% (the same as Y's interest because X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% (0.1×0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable. For purposes of paragraph (i) of this note, X's interest in "Licensee" would be 15% (0.6×0.25) and A's interest in "Licensee" would be 1.5% ($0.1 \times 0.6 \times 0.25$). Neither interest would be attributed under paragraph (i) of this note.]

(d) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant broadcast licensee, cable television system or

daily newspaper are subject to said trust.

(e) Subject to paragraph (i) of this note, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph (i) of this note, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(f)(1) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies. An interest in a Limited Liability Company ("LLC") or Registered Limited Liability Partnership ("RLLP") shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies.

(2) For a licensee or system that is a limited partnership to make the certification set forth in paragraph (f)(1) of this note, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. For a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph (f)(1) of this note, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the media activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985), as

modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the media-related businesses of the partnership or LLC or RLLP.

(3) In the case of an LLC or RLLP, the licensee or system seeking insulation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

(g) Officers and directors of a broadcast licensee, cable television system or daily newspaper are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of broadcasting, cable television service or newspaper publication, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a broadcast licensee, cable television system or daily newspaper, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the broadcast licensee, cable television system or daily newspaper subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the appropriate Ownership Report.] The officers and directors of a sister corporation of a broadcast licensee, cable television system or daily newspaper shall not be attributed with ownership of these entities by virtue of such status.

(h) Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(1) The sum of the interests held by or through "passive investors" is equal to or exceeds 20 percent; or

(2) The sum of the interests other than those held by or through "passive investors" is equal to or exceeds 5 percent; or

(3) The sum of the interests computed under paragraph (h)(1) of this note plus the sum of the interests computed under paragraph (h)(2) of this note is equal to or exceeds 20 percent.

(i) Notwithstanding paragraphs (e) and (f) of this note, the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules ("interest holder") shall have that interest attributed if:

(1) The equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value, defined as the aggregate of all equity plus all debt, of that media outlet; and

(2)(i) The interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules and is attributable under paragraphs of this note other than this paragraph (i); or

(ii) The interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held. For purposes of applying this paragraph, the term, "market," will be defined as it is defined under the specific multiple or cross-ownership rule that is being applied,

except that for television stations, the term "market," will be defined by reference to the definition contained in the television duopoly rule contained in paragraph (b) of this section.

(j) "Time brokerage" is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.

(1) Where the principal community contours (predicted or measured 5 mV/m groundwave contour for AM stations computed in accordance with § 73.183 or § 73.186 and predicted 3.16 mV/m contour for FM stations computed in accordance with § 73.313) of two radio stations overlap and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a), (c), and (d) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(2) Where two television stations are both licensed to the same market, as defined in the television duopoly rule contained in paragraph (b) of this section, and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b), (c), (d) and (e) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(3) Every time brokerage agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's

facilities, including specifically control over station finances, personnel and programming, and by the brokering station that the agreement complies with the provisions of paragraphs (b) through (d) of this section if the brokering station is a television station or with paragraphs (a), (c), and (d) if the brokering station is a radio station.

Note 3 to § 73.3555: In cases where record and beneficial ownership of voting stock is not identical (e.g., bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, investment advisors holding stock in their own names for the benefit of clients, and insurance companies holding stock), the party having the right to determine how the stock will be voted will be considered to own it for purposes of these rules.

Note 4 to § 73.3555: Paragraphs (a) through (e) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for increased power for Class C stations, to applications for assignment of license or transfer of control filed in accordance with § 73.3540(f) or § 73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled broadcast stations in the same service and if no new encompassment of Communities proscribed in paragraphs (c) and (d) of this section as to commonly owned, operated or controlled broadcast stations or daily newspaper would result. Said paragraphs will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of broadcast stations in the same service with each other no greater than already existing. (The resulting areas of overlap of contours of such broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting areas substantially

exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience or necessity.) Commonly owned, operated or controlled broadcast stations with overlapping contours or with community-encompassing contours prohibited by this section may not be assigned or transferred to a single person, group or entity, except as provided above in this note and by § 73.3555(a). If a commonly owned, operated or controlled broadcast station and daily newspaper fall within the encompassing proscription of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

Note 5 to § 73.3555: Paragraphs (a) through (e) of this section will not be applied to cases involving television stations that are "satellite" operations. Such cases will be considered in accordance with the analysis set forth in the Report and Order in MM Docket No. 87-8, FCC 91-182 (released July 8, 1991), in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. An authorized and operating "satellite" television station, the Grade B contour of which overlaps that of a commonly owned, operated, or controlled "non-satellite" parent television broadcast station, or the Grade A contour of which completely encompasses the community of publication of a commonly owned, operated, or controlled daily newspaper, or the community of license of a commonly owned, operated, or controlled AM or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such AM broadcast station or the 1 mV/m contour of such FM broadcast station, may subsequently become a "non-satellite" station under the circumstances described in the aforementioned Report and Order in MM Docket No. 87-8. However, such commonly owned, operated, or controlled "non-satellite" television stations and AM or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity

except as provided in Note 4 of this section. Nor shall any application for assignment or transfer concerning such "non-satellite" stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated, or controlled newspaper is proposed to be transferred, except as provided in Note 4 of this section.

Note 6 to § 73.3555: For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

Note 7 to § 73.3555: The Commission will entertain applications to waive the restrictions in paragraph (b) and (c) of this section (the TV duopoly and TV- radio cross-ownership rules) on a case-by-case basis. In each case, we will require a showing that the in-market buyer is the only entity ready, willing, and able to operate the station, that sale to an out-of-market applicant would result in an artificially depressed price, and that the waiver applicant does not already directly or indirectly own, operate, or control interest in two television stations within the relevant DMA. One way to satisfy these criteria would be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the permit, and that no reasonable offer from an entity outside the market has been received. We will entertain waiver requests as follows:

(1) If one of the broadcast stations involved is a "failed" station that has not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application.

(2) For paragraph (b) of this section only, if one of the television stations involved is a "failing" station that has an all-day audience share of no more than four per cent; the station has had negative cash flow for three consecutive years

immediately prior to the application; and consolidation of the two stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity.

(3) For paragraph (b) of this section only, if the combination will result in the construction of an unbuilt station. The permittee of the unbuilt station must demonstrate that it has made reasonable efforts to construct but has been unable to do so.

Note 8 to § 73.3555: Paragraph (a)(1) of this section will not apply to an application for an AM station license in the 535-1605 kHz band where grant of such application will result in the overlap of 5 mV/m groundwave contours of the proposed station and that of another AM station in the 535-1605 kHz band that is commonly owned, operated or controlled if the applicant shows that a significant reduction in interference to adjacent or co-channel stations would accompany such common ownership. Such AM overlap cases will be considered on a case-by-case basis to determine whether common ownership, operation or control of the stations in question would be in the public interest. Applicants in such cases must submit a contingent application of the major or minor facilities change needed to achieve the interference reduction along with the application which seeks to create the 5 mV/m overlap situation.

Note 9 to § 73.3555: Paragraph (a)(1) of this section will not apply to an application for an AM station license in the 1605-1705 kHz band where grant of such application will result in the overlap of the 5 mV/m groundwave contours of the proposed station and that of another AM station in the 535-1605 kHz band that is commonly owned, operated or controlled. Paragraphs (d)(1)(i) and (d)(1)(ii) of this section will not apply to an application for an AM station license in the 1605-1705 kHz band by an entity that owns, operates, controls or has a cognizable interest in AM radio stations in the 535-1605 kHz band.

Note 10 to § 73.3555: Authority for joint ownership granted pursuant to Note 9 will expire at 3 a.m. local time on the fifth anniversary for the date of issuance of a construction permit for an AM radio station in the 1605-1705 kHz band

