

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

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

ORDER

Adopted: December 18, 2020

Released: December 18, 2020

By the Chief, Media Bureau:

1. By this Order, the Media Bureau (Bureau) grants a temporary waiver of the Commission's newspaper/broadcast cross-ownership rule (NBCO rule), 47 CFR § 73.3555(d), to Fox Television Stations, LLC (Fox), in order to allow Fox to continue its common ownership of WWOR-TV, Secaucus, New Jersey (WWOR) and the New York Post newspaper (the Post), a combination that has been in place for nearly two decades in the highly diverse New York market. With this Order, Fox may continue to own collectively WWOR and the Post, as well as WNYW(TV), New York, New York (WNYW), for which Fox previously received a permanent waiver of the NBCO rule in 1993,1 until 180 days after conclusion of the next Quadrennial Review proceeding that addresses the status of the NBCO rule,2 including any appeals of a public interest determination made in such proceeding that the rule remains necessary in the public interest. As detailed further below, the Bureau finds sufficient grounds to support a temporary waiver of the NBCO rule in this case. The action in this Order preserves the status quo and avoids the prospect of either precipitously requiring a divestiture that might prove unnecessary or authorizing a permanent combination while regulatory uncertainty remains over the status of the NBCO rule. It is possible, for example, that the U.S. Supreme Court will affirm the Commission's repeal of that rule, which was vacated by the U.S. Court of Appeals for the Third Circuit. Even if it does not, the Third Circuit did not question, nor did any party challenge in the Third Circuit, the Commission's 2017 finding that the NCBO rule was unnecessary to promote competition and viewpoint diversity. Further, there has been no recent Commission determination that an absolute ban on newspaper-broadcast combinations, in light of all relevant public interest factors, remains in the public interest today. We therefore find it appropriate that Fox should continue to enjoy the benefit of a temporary waiver until the conclusion of the next Quadrennial Review to address the NBCO rule, which would provide the Commission with an opportunity to address the Third Circuit's remand, if still operative, or any new Third Circuit decision following Supreme Court review, and determine whether, under section 202(h), the NBCO rule remains necessary in the public interest.

2. Background. In 1975, the Commission adopted the NBCO rule, which since that time generally has prohibited common ownership of a daily print newspaper and a full-power broadcast station (AM, FM, or TV) if the station's relevant service contour encompasses the newspaper's community of

1 See Fox Television Stations Inc., Declaratory Ruling, 8 FCC Rcd 5341 (1993) (1993 WNYW Permanent Waiver Order).

2 We expect that the Commission would resolve any further judicial remand by consolidating the 2014 Quadrennial Review, which remains pending as a result of ongoing litigation, with the 2018 Quadrennial Review, in which the Commission would be required to determine whether the NBCO rule remains in the public interest if the rule remains in place following Supreme Court review. 2018 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 18-349, Notice of Proposed Rulemaking, 33 FCC Rcd 12111 (2018); Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996).

publication.³ Historically, the primary purpose behind the rule has been to promote viewpoint diversity as the Commission found it “essential to a democracy that its electorate be informed and have access to divergent viewpoints on controversial issues.”⁴ Since the NCBO rule’s adoption, however, the marketplace has changed significantly with the introduction of new sources of news and information along with significant changes within both the broadcast and newspaper industries.⁵ As such, the Commission has attempted to revise or eliminate the rule on multiple occasions as part of its periodic review of the media ownership rules mandated by Congress pursuant to section 202(h) of the Telecommunications Act of 1996, noting both the “wealth of additional information sources available in the media marketplace today” as well as the “challenges facing the newspaper industry and the resulting effects on the ability of print newspapers to serve their readers.”⁶

3. Most recently, the Commission eliminated the NBCO rule in its entirety pursuant to its *2017 Order on Reconsideration*, which reversed elements of the Commission’s earlier *2016 Second Report and Order* in the quadrennial media ownership proceeding.⁷ As a result, the combination of WWOR and the *Post* was authorized by operation of law for nearly two years.⁸ Following an appeal, the U.S. Court of Appeals for the Third Circuit (Third Circuit) subsequently reversed and remanded the *2017 Order on Reconsideration*, thereby overturning the elimination of the NBCO rule and reinstating it.⁹ The decision of the Third Circuit has been appealed further, and currently, the NBCO rule, as well as other media ownership rules, are the subject of review by the Supreme Court.¹⁰

4. While the Supreme Court case is pending, matters involving the NBCO rule are governed by the reinstated *2016 Second Report and Order*, which upheld the NBCO rule and also laid out a standard of review for potential waivers to the rule.¹¹ Specifically, in the *2016 Second Report and Order*, the Commission adopted a case-by-case approach to requests for waivers of the rule pursuant to which the

³ 47 CFR § 73.3555(d); *see also Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1074, para. 99 (1975) (*1975 Second Report and Order*).

⁴ *Id.*

⁵ *In re 2014 Quadrennial Regulatory Review*, Order on Reconsideration and Notice of Proposed Rulemaking, MB Docket Nos. 14-50 et al., 32 FCC Rcd 9802, 9811-9815, paras. 16-22 (2017) (*2017 Order on Reconsideration*).

⁶ *2017 Order on Reconsideration*, 32 FCC Rcd at 9814-16, paras. 22-23 (eliminating the NBCO rule); *see also 2014 Quadrennial Regulatory Review*, MB Docket Nos. 14-50 et al., Second Report and Order, 31 FCC Rcd 9864, 9913-14, para. 133 (*2016 Second Report and Order*) (retaining the NBCO rule but establishing a case-by-case waiver process); *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket Nos. 06-121 et al., Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2018-19, para. 13 (2008) (adopting a presumption that “certain limited combinations of newspaper and broadcast facilities in the largest markets are in the public interest”); *2002 Biennial Regulatory Review - Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket Nos. 02-277 et al., Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13747, para. 327 (2003) (finding that the NBCO rule was not in the public interest and replacing it with a “set of cross-media limits”); Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996).

⁷ *2017 Order on Reconsideration*, 32 FCC Rcd at 9806-9808, paras. 8-10.

⁸ The Commission’s repeal of the NBCO rule became effective on Feb. 7, 2018. *2014 Quadrennial Regulatory Review*, 83 Fed. Reg. 733-01 (Jan. 8, 2018). The rule was reinstated following judicial vacatur on Dec. 20, 2019. *2014 Quadrennial Regulatory Review*, MB Docket Nos. 14-50 et al., Order, 34 FCC Rcd 12360 (MB 2019).

⁹ *See Prometheus Radio Project v. FCC*, 939 F.3d 567 (3d Cir. 2019).

¹⁰ *See FCC v. Prometheus Radio Project*, No. 19-1231 (U.S. cert. granted Oct. 2, 2020).

¹¹ *2016 Second Report and Order*, 31 FCC Rcd at 9912-9914, paras. 129-134, reinstated by *2014 Quadrennial Regulatory Review*, MB Docket Nos. 14-50 et al., Order, 34 FCC Rcd 12360 (MB 2019).

Commission reviews each individual waiver request by assessing the totality of the circumstances without measuring the request against defined criteria or awarding any kind of automatic presumption.¹² The Commission stated that such a case-by-case review would focus primarily on the issue of whether strict application of the NBCO rule was necessary to promote the goal of viewpoint diversity in that particular local market based on the facts and circumstances presented.¹³ In summary, the party seeking a waiver must show that granting a waiver will not unduly harm viewpoint diversity.¹⁴ The Commission also held that licensees were free to offer additional justifications for a waiver pursuant to section 1.3 of the Commission's rules, such as equitable considerations.¹⁵

5. On October 5, 2020, Fox filed a request for permanent waiver seeking Commission consent for the continuation of its common ownership of WWOR and the *Post* newspaper.¹⁶ Fox already commonly owns WNYW and the *Post* as the result of a permanent waiver it received in 1993.¹⁷ In its request, Fox explains that it has commonly owned the three properties (two television stations and the daily newspaper) since it acquired WWOR in 2001 and has received repeated temporary waivers to continue owning WWOR based on the Commission's public interest analysis.¹⁸ Fox contends that granting a permanent waiver would end uncertainty for Fox and preserve the status quo for viewers in the New York market.¹⁹ Fox also notes what it characterizes as the outdated nature of the NBCO rule and the repeated efforts by the Commission to repeal or revise the rule as grounds for granting WWOR a permanent waiver.²⁰

6. On November 13, 2020, the Media Bureau released a Public Notice seeking comment on Fox's request for permanent waiver.²¹ On December 1, 2020, Free Press, United Church of Christ, OC

¹² 2016 *Second Report and Order*, 31 FCC Rcd at 9938-9939, para. 184.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 9940, para. 188; 47 CFR § 1.3.

¹⁶ Request of Fox Corp. for Permanent Waiver of Newspaper-Broadcast Cross-Ownership Rule, 47 C.F.R. §73.3555(d), MB Docket No. 20-378 (filed Oct. 5, 2020) (Fox Waiver Request).

¹⁷ See 1993 *WNYW Permanent Waiver Order*.

¹⁸ Fox Waiver Request at 1-2. Fox previously received temporary waivers to own WWOR and the *Post* in 2001, 2006, and 2014. See *UTV of San Francisco Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 14975, 14989-90, para. 45 (2001); see *Applications for Transfer of Control of Fox Television Stations, Inc. from K. Rupert Murdoch to Fox Entertainment Group*, Memorandum Opinion and Order, 21 FCC Rcd 11499, 11502, para. 8 (2006); see *Application for Renewal of License of WWOR-TV, et al.*, Memorandum Opinion and Order, 29 FCC Rcd 9564, 9579, para. 44 (2014). As stated above, in 2017, the Commission eliminated the newspaper/broadcast cross-ownership rule, and the combination of WWOR and the *Post* was authorized by operation of law for nearly two years with no need for a waiver. See *In re Fox Television Stations, Inc.*, Memorandum Opinion and Order, 33 FCC Rcd 7221, para. 3 (2018) (finding the waiver moot after the rule's repeal).

¹⁹ Fox Waiver Request at 1-2. Fox states that "disrupting the current ownership structure of the Stations and the *Post* would introduce uncertainty as to their future, potentially reducing competition and diversity in the market." *Id.* at 4.

²⁰ *Id.* at 2-4.

²¹ *Media Bureau Seeks Comment on Request for Permanent Waiver of Newspaper-Broadcast Cross-Ownership Rule Filed by Fox Corp.*, MB Docket No. 20-378, Public Notice, DA 20-1350 (rel. Nov. 13, 2020). Upon motion by Free Press, et al., the Bureau extended the deadline to file comments. See Free Press Motion for Extension of Time, MB Docket No. 20-378 (filed Nov. 20, 2020); *Fox Corp. Request for Permanent Waiver of the Newspaper-Broadcast Cross-Ownership Rule*, MB Docket No. 20-378, Order Granting Extension of Time to File Comments and Reply Comments, DA-20-1401 (rel. Nov. 24, 2020) (giving the public additional time to comment on Fox's waiver request).

Inc., and Common Cause (Free Press et al.) filed an opposition to the request for permanent waiver claiming Fox obscures the two decades of opposition to a waiver for WWOR and taking issue with WWOR's commitment to localism for its Secaucus, New Jersey community of license.²² Fox replied to Free Press et al.'s opposition on December 8, 2020,²³ disagreeing with the opposition's assessment of the waiver history and explaining why a permanent waiver would not negatively impact viewpoint diversity in the New York market. On that same day, the News Media Alliance filed comments in support of the Fox request.²⁴

7. *Discussion.* In view of the unique history of the Fox newspaper-broadcast combinations, which we must view against the backdrop of the Commission's multiple determinations that the NBCO rule no longer serves the public interest, the most recent of which is subject to pending Supreme Court review, and given that the New York market is highly diverse, we find that the grant of a temporary waiver in this case is warranted to allow Fox to continue to own WWOR and the *Post* pending the conclusion of judicial and regulatory proceedings regarding the NBCO rule.²⁵ A temporary waiver will avoid the unfair and disruptive consequences of a forced divestiture before a definitive judicial determination regarding the status of the NBCO rule, and any subsequent regulatory reconsideration of the NBCO rule, and will afford Fox the clarity and business assurance necessary to support its continued investment in the newsgathering and other operations of its media outlets to the benefit of the public. A temporary waiver will permit the continued joint ownership and operation of these facilities in the already-diverse New York market while regulatory uncertainty over the NBCO rule exists in light of the pending case in the U.S. Supreme Court and the potential that the Commission may need to readdress the status of the NBCO rule in the 2014 or 2018 Quadrennial Review proceeding.²⁶

8. Similarly, however, we do not believe it appropriate, given the pendency of the Court's review, to grant a permanent waiver based on the standard outlined in the *2016 Second Report and Order*. Rather, we find that the better course is to maintain the status quo, both for the marketplace and the licensee, pending the outcome of the litigation and any subsequent reconsideration of the NBCO rule by the Commission.

9. We find this resolution especially fair in light of the fact that the Commission in 2017 made findings, unchallenged in the pending litigation, that the NBCO rule is unnecessary to further the public interest goals of competition and viewpoint diversity. These findings mirror those of prior Commissions that have, on at least two other prior occasions, attempted to repeal or relax the NBCO rule, only to be reversed by the Third Circuit.²⁷ We do not believe it is fair for Fox to have to make this

²² Opposition of Free Press, United Church of Christ, OC Inc., and Common Cause, MB Docket No. 20-378, (filed Dec. 1, 2020).

²³ Reply Comments of Fox Corporation, MB Docket No. 20-378, (filed December 8, 2020).

²⁴ Reply Comments of the News Media Alliance, MB Docket No. 20-378, (filed December 8, 2020).

²⁵ See *Network IP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166. Although the Commission has declined in the past to grant multiple ownership waivers pending the outcome of rulemaking proceedings, see *Shareholders of Tribune Co., Transferors & Sam Zell, et al. Transferees*, 29 FCC Rcd 844, 851-52, para. 23 (2014), our action here is distinguishable given the pendency of litigation following the Commission's determination that the public interest does not warrant any restriction on the common ownership of newspapers and broadcast stations and the Supreme Court's decision to grant *certiorari*, which may definitively resolve long-pending issues directly bearing on the NBCO rule.

²⁶ To the extent that Fox has sought to also affirm the status of its prior permanent waiver authorizing the common ownership of WNYW and the *Post* (see Fox Waiver Request at footnote 1) we affirm that nothing has changed the status of the permanent waiver previously received by WNYW and the *Post*.

²⁷ See *supra* para. 2.

divestiture unless and until the Commission revisits the NCBO rule and deems it to be necessary in the public interest pursuant to section 202(h) and any such determination withstands judicial review.

10. We note that in recognizing that a complete ban on newspaper/broadcast cross-ownership was potentially overbroad, and instead adopting a case-by-case waiver process in 2016, the Commission acknowledged that the impact of a proposed combination on viewpoint diversity would depend largely on the characteristics of the local market.²⁸ In that regard, the local market at issue here, New York, is a unique and especially diverse media market. For instance, the Commission has previously found the New York media market—the largest market in the country—to have an “extreme diversity of voices” with several newspapers, numerous broadcast stations, and other digital media outlets, as it still does today.²⁹ In addition, over the nearly 20 years of Fox’s common ownership of WWOR and the *Post*, it does not appear that the common ownership has diminished viewpoint diversity, but rather has supported viewpoint diversity by stabilizing the once precarious position of the *Post* and thereby retaining that daily newspaper. To the extent that continued common ownership of WWOR and the *Post* precludes entry of an additional independent voice in the New York market, this minimal effect on diversity is outweighed by equitable considerations and the possible negative impact on service to consumers resulting from disruption.³⁰ Thus, we believe the continuation of this existing waiver on a temporary basis pending the outcome of the relevant litigation and any subsequent reconsideration of the NCBO rule by the Commission will not unduly harm viewpoint diversity in the New York market.

11. As noted above, the combination at issue here long predates the current litigation surrounding the rule and the question before the Supreme Court of whether to eliminate the rule in its entirety or leave in place the current rule (and the associated waiver process). Therefore, as the ultimate fate of the NBCO rule lies with the Supreme Court and any subsequent rulemaking actions the Commission might take as a result, we find it appropriate to maintain the status quo in this case pending the decision of the U.S. Supreme Court and any subsequent Commission consideration of whether the NBCO rule remains in the public interest in light of judicial review of its 2017 determination and the record developed in the next Quadrennial Review proceeding to take up the NCBO rule. Fox will be afforded 180 days from a final and unappealable Commission decision concluding that the NCBO rule remains in the public interest to arrange an orderly divestiture or request a new waiver should common ownership of WWOR and the *Post* be prohibited at that time.

12. Accordingly, **IT IS ORDERED**, that the request for permanent waiver filed by Fox **IS DENIED**, and a temporary waiver **IS GRANTED** to permit continued common ownership of WWOR-TV and the *New York Post* until 180 days following the date that a Commission order making a determination reaffirming that the NCBO rule remains in the public interest becomes final and unappealable, including exhaustion of any Supreme Court review.

²⁸ 2016 *Second Report and Order*, 31 FCC Rcd at 9913-14, para. 133.

²⁹ *In re K. Rupert Murdoch & Fox Entertainment Group.*, Memorandum Opinion and Order on Reconsideration, 24 FCC Rcd 5824, 5829, para. 19 (2009). As we noted eleven years ago, the New York media market, which covers portions of four states, is a large, unique, and diverse market, and remains so today, with 18 independent owners of television stations (not including Fox), nearly 60 owners of commercial and noncommercial radio stations, more than 30 daily newspapers (in addition the NY Post), as well as numerous other cable, online, and print news sources. *See, e.g.*, S&P Global, TV Stations by Market and Affiliation (last accessed Dec. 16, 2020); S&P Global, *Radio Stations by Market and Format* (last accessed Dec. 16, 2020).

³⁰ Indeed, even as early as 1993, in granting Fox a permanent waiver for common ownership of WNYW and the *Post*, the Commission noted “the wide array of voices in New York City,” concluding that any adverse impact on diversity from the combination would be “negligible.” 1993 *WNYW Permanent Waiver Order*, 8 FCC Rcd at 5351, para. 48.

13. **IT IS FURTHER ORDERED** that, should no petitions for reconsideration, applications for review, or petitions for judicial review be timely filed, MB Docket No. 20-378 **SHALL BE TERMINATED** and its docket **CLOSED**.

14. This action is taken pursuant to authority found in sections 4(i) and 303 of the Communications Act of 1934, as amended,³¹ and sections 0.204, 0.283, 1.3, and 73.3555(d) of the Commission's rules.³²

FEDERAL COMMUNICATIONS COMMISSION

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³¹ 47 U.S.C. §§ 154(i), 303(r).

³² 47 CFR §§ 0.204, 0.283, 1.3, 73.3555(d).