

WJW License, Inc.)	
WJW-TV, Cleveland, Ohio	)	BTCCT-960813IS
)	
WITI License, Inc.)	
WITI-TV, Milwaukee, Wisconsin	)	BTCCT-960813IT
)	
TVT License, Inc.)	
WTVT(TV), Tampa, Florida	)	BTCCT-960813IU

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 1996

Released: November 7, 1996

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration the above-captioned applications seeking consent to the transfer of control of New World Communications Group Inc. (New World), and its subsidiaries from NWCG (Parent) Holdings Corp. and NWCG Holdings Corp. to Fox Television Stations, Inc. (Fox). Pursuant to an Agreement and Plan of Merger and a Stock Purchase Agreement between the parties, New World will become a wholly-owned subsidiary of Fox. The National Association of Broadcast Employees and Technicians, the Broadcast and Broadcast Cable Television Sector of the Communications Workers of America, AFL-CIO, Local No. 43 (NABET), timely filed a petition to deny the transaction.

2. New World, through several holding companies, wholly owns the stock of the licensees of the ten television stations and seven television translators referenced above. Fox controls the licenses of 12 television stations, including station WFLD(TV) (Fox), Channel 32, Chicago, Illinois. Because the Grade B contour of station WFLD(TV) overlaps with that of New World station WITI-TV (Fox), Channel 6, Milwaukee, Wisconsin, common ownership of both stations by Fox will contravene the Commission's duopoly rule, Section 73.3555(b), which proscribes common ownership of two television stations with overlapping Grade B contours. Consequently, Fox seeks a permanent waiver of the duopoly rule. In the alternative, Fox requests a conditional waiver of the rule subject to the outcome of the pending broadcast television ownership rulemaking, which is considering altering the duopoly rule, for a period lasting six months from the issuance of a final order in the proceeding. *See Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making* in MM Docket Nos. 91-221 and 87-8, FCC 96-438, released November 7, 1996 (*Television Ownership*

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

In re Applications of)	
)	
NWCG (PARENT) HOLDINGS CORP.)	
& NWCG HOLDINGS CORP.)	
(Transferor))	
)	
and)	
)	
FOX TELEVISION STATIONS, INC.)	
(Transferee))	
)	
For Transfer of Control of New World)	
Communications Group Inc. Parent of:)	
)	
KSAZ License, Inc.)	
KSAZ-TV, Phoenix, Arizona	)	File Nos. BTCCT-960813IC
K04IA, Prescott, Arizona	)	BTCTTV-960813ID
K09JZ, Winslow, Arizona	)	BTCTTV-960813IE
K25DP, Williams Arizona	)	BTCTT-960813IF
K26DH, Flagstaff, Arizona	)	BTCTT-960813IG
K36AE, Phoenix, Arizona	)	BTCTT-960813IH
K55BW, Madera Park, Arizona	)	BTCTT-960813II
K68BW, East Flagstaff, Arizona	)	BTCTT-960813IJ
)	
WDAF License, Inc.)	
WDAF-TV, Kansas City, Missouri	)	BTCCT-960813IK
)	
KDFW License, Inc.)	
KDFW-TV, Dallas, Texas	)	BTCCT-960813IL
)	
KTVI License, Inc.)	
KTVI-TV, St. Louis, Missouri	)	BTCCT-960813IM
)	
KTBC License, Inc.)	
KTBC-TV, Austin, Texas	)	BTCCT-960813IN
)	
WAGA License, Inc.)	
WAGA-TV, Atlanta, Georgia	)	BTCCT-960813IQ
)	
WJBK License, Inc.)	
WJBK-TV, Detroit, Michigan	)	BTCCT-960813IR
)	

Second Further Notice).¹

3. In support of its request, Fox notes several factors it believes weigh in favor of waiving the rule, including the size of the overlap, the level of diversity in the overlap area, the separateness of the markets, and various other public interest factors. According to Fox's engineering exhibit, the Grade B overlap encompasses 2,666 square kilometers, representing 14.7% and 16.5% of the area within the WITI-TV and WFLD(TV) Grade B contours, respectively, and 849,139 people, representing 29.4% and 10.2% of the populations within the Grade B contours of WITI-TV and WFLD(TV), respectively. Fox claims that the overlap percentages fall within the range of overlap previously approved by the Commission, particularly in cases involving stations located in the Philadelphia and New York markets, *see, e.g., Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841 (1996); *Stockholders of CBS Inc.*, 11 FCC Rcd 3733 (1995); *Station Partners*, 10 FCC Rcd 12384 (1995), and notes that in waiving the duopoly rule for a Los Angeles-San Diego duopoly, the Commission stated that the Philadelphia-New York cases provide guidance for waiver requests involving "proximate major urban markets which are clearly separate and distinct in nature." *San Diego Television*, FCC 96-111, at ¶12 released March 15, 1996. Fox also notes that the Commission has granted waiver of the duopoly rule for a Milwaukee-Chicago overlap. *Weigel Broadcasting*, FCC 96-204, released May 17, 1996. Fox concludes that the Philadelphia-New York, Los Angeles-San Diego, and Milwaukee-Chicago cases all provide precedent that support grant of this waiver.

4. Second, regarding diversity and competition, Fox argues that Chicago and Milwaukee are both competitive markets, with numerous television stations available to viewers in the overlap areas. According to the applicant, 17 additional television stations provide service to all or part of the overlap area, with every part of the overlap area receiving a minimum of six other television services, including 5 commercial stations, and a maximum of 14 other stations, including 11 commercial stations. The number of competitive services in the area, asserts Fox, is comparable or greater than the number of stations present in other waiver requests approved by the Commission. *See, e.g., WHTM-TV, Inc.*, FCC 96-77 (released Feb. 29, 1996) (22 alternative stations serving all or part of the overlap area). Fox further notes that 16 television stations, including 13 commercial stations, are licensed in the Chicago Designated Market Area (DMA), and that another 12 television stations, including 10 commercial stations, are licensed in the Milwaukee DMA. Additionally, the applicant states that cable penetration in the Chicago

¹ On November 7, 1996, the Commission approved the transfer of control of KNSD-TV, San Diego, California from New World to the NBC, and granted a waiver of the duopoly rule for an overlap between KNSD-TV and KNBC-TV, Los Angeles, California, conditioned on NBC coming into compliance with the outcome of the pending broadcast television ownership rulemaking proceeding within six months of its conclusion. *KNSD License, Inc.* DA 96-1848, released November 7, 1996. Fox notes that because the Grade B contour of KNSD-TV overlaps with that of Fox-owned KTTV(TV), Los Angeles, should consummation of the KNSD-TV transaction not occur prior to that of the New World-Fox transaction, Fox would have common control of both stations in violation of the duopoly rule. Consequently, Fox pledges to "take appropriate measures with respect to KNSD-TV . . . in order to ensure compliance with the rules and regulations of the Commission." We therefore expect that consummation of the instant transaction will not occur prior to consummation of the KNSD-TV transaction.

DMA is 58.8% and in the Milwaukee DMA is 57%, and that DBS and MMDS services are available in both markets. Further, according to Fox, approximately 179 radio stations, of which 135 are commercial, are licensed to the Chicago DMA, and approximately 84 radio stations, of which 73 are commercial, are licensed to the Milwaukee DMA. Finally, the applicant claims that there are 23 daily newspapers published in the Chicago DMA and nine daily newspapers published in the Milwaukee DMA. Fox argues that "a variety of voices mitigates against any appreciable adverse impact on diversity." *San Diego Television, Inc.*, FCC 96-111 at ¶14.

5. As to the separateness of the markets, Fox asserts that Milwaukee and Chicago are separate markets, noting that the two cities are approximately 90 miles apart, in different states and constitute the 31st and the 3rd largest DMAs in the country, respectively. Fox maintains that the fact that they are in different DMAs reflect that the stations do not compete with respect to programming, viewers, or advertisers. Specifically, the applicant claims: that, as attested to in the declarations of WFLD's national sales representative and both stations' general sales managers, neither national nor local advertisers purchasing time on either station seek the audience of the other market; that records at both stations indicate that no Wisconsin political candidate has sought time on WFLD, nor have any Illinois candidates sought to purchase time on WITI; that the news departments of the stations do not cover events occurring in the other's market and the public affairs programming and community service campaigns of each station are designed for separate audiences; and that each station has minimal, if any, viewership in the other market which, Fox asserts, demonstrates that viewers in each market do not regard the out-of-market station as a desirable viewing alternative.² Fox also pledges that the stations will not engage in joint or combined advertising sales should they be commonly owned, and that the programming decisions for each station will be made independently of the other. To further demonstrate the separateness of the stations' operations, Fox states that although they will both be controlled by the same company, they will have separate operations with respect to management, programming, traffic and advertising sales. Therefore, because the stations are in separate and distinct markets and will have independent operations, urges the applicant, common ownership of both stations will not adversely affect diversity or economic competition in these markets.

6. With respect to the public interest benefits resulting from grant of the waiver request, Fox notes that it has made an institutional commitment to local news programming on each of its stations, and that it is committed to enhancing coverage of the overlap area and increasing the responsiveness of the stations' news programming to the needs of viewers in Milwaukee and Chicago. In an amendment to its application, Fox lists the regularly scheduled, locally-produced non-entertainment programs on WFLD and WITI, and states that "[g]iven the substantial amount of [this] programming currently broadcast by WITI and WFLD, it is difficult to propose the addition of a specified quantity of regularly scheduled non-entertainment programming to the schedule of either station." Nevertheless, the applicant pledges to, for at least the duration of the

² For example, according to Fox, in the two Illinois counties located within the overlap area, WITI has almost no measured viewing.

waiver, create and broadcast on WITI a new weekly half-hour locally-produced public affairs program that addresses issues of concern to residents in the Wisconsin counties located within the overlap area.

7. Petitioner argues that the transfer should be denied because it violates both the multiple ownership and the foreign ownership rules. Regarding the multiple ownership issue, NABET claims that the existence of the outstanding television multiple ownership rulemaking proceeding does not provide support for Fox's duopoly waiver request, and that ownership by Fox of the New World stations would result in a violation of the national television ownership rule "with respect to the number of stations owned . . . and the aggregate national audience reached by those stations." Finally, NABET claims that because the ultimate parent of Fox is The News Corporation Limited (News Corp.), an Australian company, Fox's control of New World violates Section 310 (b)(3) of the Communications Act, which forbids a non-controlling alien investment of more than 20%.

8. Both Fox and New World filed oppositions to the NABET petition, each noting that the claim that the transfer violates the national multiple ownership rules appears to be based on a version of the rules that existed prior to the enactment of the Telecommunications Act of 1996 in February, 1996. The Act eliminated the 12-station television ownership cap, *see* 47 C.F.R. §73.3555(e)(iii)(1995), and raised the national audience reach cap from 25% to 35%. *See* 47 C.F.R. §73.3555(e)(1)(1996). Fox notes that even if it owned the New World stations, it would not hold interests in stations having more than a 35% national audience reach. *See* §73.3555(e). Regarding the assertion that the proposed transaction violates Section 310(b)(3), Fox notes that the transaction will occur at the holding company level, several levels removed from the licensee and involves no direct foreign investment in a licensee. Thus, Fox argues that this transaction does not implicate the direct alien investment limitation of Section 310(b)(3). Fox further notes that the Commission has found the indirect equity interest in Fox held by News Corp. consistent with Section 310(b)(4) of the Communications Act.

9. *Discussion:* The television duopoly rule, 47 C.F.R. §73.3555(b), generally prohibits the common ownership of television stations whose Grade B contours overlap. The ultimate objective of the duopoly rule is to promote diversification of programming sources and viewpoints, and to prevent an undue concentration of economic power by fostering economic competition in broadcasting. *Multiple Ownership Rules*, 22 F.C.C. 2d 306, 307 (1970), *recon. granted in part*. 28 F.C.C. 2d 662 (1971). In adopting the duopoly rule's fixed standard of a prohibited overlap of Grade B service contours, the Commission sought to provide a greater degree of certainty than under its prior rule, which prohibited the common ownership of television stations serving "substantially the same service area." *Multiple Ownership of Standard FM and Television Broadcast Stations*, 45 F.C.C. 1476, *recon. granted in part*, 3 R.R. 2d 1554 (1964). The Commission maintained a policy of "flexibility," however, noting that the rule could be waived in certain instances. *Id.* at 1476 n.1. Under this policy, the Commission has developed a set of factors to be considered when evaluating an applicant's request for waiver of the duopoly rule, including the extent of the overlap, the distinctiveness of the respective markets, the concentration of economic power resulting from the combination, the independence of the

stations' operations, and the number of media voices available in the overlap area. *See, e.g., Iowa State University Broadcasting Corporation*, 9 FCC Rcd 481, 487-88 (1993), *aff'd sub nom. Iowans for WOI-TV, Inc.*, 50 F.3d 1096 (D.C. Cir. 1995). Assessment of both temporary and permanent waiver requests rely on these factors, but the factors may be accorded different weight and may be analyzed differently for temporary waivers due to the limited duration of the proposed combination. After weighing these factors, the Commission considers whether the public interest benefits to be gained from waiving the duopoly rule would be greater than any detrimental effects resulting from the overlap. *Capital Cities Communications, Inc.*, 59 R.R. 2d 451, 465 (1985), as well as any compelling circumstances specific to the case weighing in favor of grant of the requested waiver. *See, e.g., John H. Phipps*, FCC 96-395, released September 27, 1996 (grant of waivers ultimately results in break-up of existing duopoly and newspaper-broadcast combinations); *Taft Broadcasting Partners Limited Partnership*, 7 FCC Rcd at 2855 (financial difficulties); *Channel 33, Inc.*, 4 FCC Rcd at 7679-80 (bankruptcy). As with any waiver, a duopoly waiver will be granted only if the Commission concludes that it is in the public interest.

10. The Commission has undertaken a reexamination of its broadcast television ownership policies, including the duopoly rule. In January 1995, the Commission adopted a *Notice of Proposed Rulemaking* which, *inter alia*, proposed a new analytical framework within which the Commission would evaluate the local television ownership rules and also proposed revisions to those rules, including the television duopoly rule. *See Further Notice of Proposed Rulemaking* in MM Docket Nos. 91-221 and 87-8, 10 FCC Rcd 3524 (1995). During the pendency of that proceeding, the Telecommunications Act of 1996 was passed. Section 202(c)(2) of the Act requires the Commission to "conduct a rule making proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control or have a cognizable interest in, within the same television market." Pub. L. No. 104-104, §202(c)(2), 110 Stat. 56 (1996).³ In response to these directives, and in order to update the record, the Commission released the *Television Ownership Second Further Notice*. In the *Notice*, the Commission tentatively decided to authorize common ownership of television stations that are in separate Designated Markets Areas (DMAs) and whose Grade A contours do not overlap. *Television Ownership Second Further Notice* at ¶57.

11. In the *Television Ownership Second Further Notice*, the Commission stated that it will be inclined, during the pendency of that proceeding, to grant waivers of the duopoly rule, conditioned on coming into compliance with the outcome of the proceeding within six months of its conclusion, if such waivers involve stations in different DMAs with no overlapping Grade A contours. Additionally, the *Notice* gave Commission staff delegated authority to act on applications seeking waivers consistent with this interim policy. Given the clearly articulated policy in the *Television Ownership Second Further Notice*, we do not believe that an unconditional grant of Fox's duopoly waiver request is appropriate. We conclude, however, that grant of its alternative request for a conditional waiver of the duopoly rule, subject to the

³ In addition to this specific directive to review the television duopoly rule, the Telecommunications Act mandates that the Commission conduct a biennial review of all of its broadcast ownership rules. *See Id.* at § 202(h).

outcome of the pending television ownership rulemaking is justified. In this case the Grade A contours of WFLD and WITI do not overlap, nor are the stations located in the same DMA. Thus, the facts in this case render Fox's alternative temporary waiver request consistent with the interim policy set forth in the *Television Ownership Second Further Notice*. Furthermore, our review of the showing made by Fox in this case, as detailed above, reveals nothing suggesting that the Commission should not follow the established interim policy here.

12. Lastly, we find that NABET has failed to make specific allegations of fact sufficient to show that grant of the transfer would be *prima facie* inconsistent with the public interest, convenience, and necessity. First, we reject petitioner's claim that the transaction, if approved would violate the multiple ownership rules. As noted by the applicants, because the national television station cap has been eliminated, common ownership of over twelve television stations would not violate Commission rules. Likewise, common ownership of all these stations would not exceed the national audience reach limit, which was extended from 25% to 35%. Specifically, according to Fox, upon consummation of the subject transaction, it will have attributable ownership interests in 22 television stations, including 17 VHF and 5 UHF stations, having an aggregate audience reach, after application of the 50% UHF discount, of 34.83%.⁴ Because none of the stations to be acquired by Fox in this transaction are UHF facilities and because Fox will comply with the 35% audience reach limitation after the proposed transaction, our action here need not be and is not conditioned upon any pending or future Commission proceeding concerning the UHF discount.⁵ Additionally, petitioner's belief that the television multiple ownership rulemaking proceeding does not support waiver of the duopoly rule is belied by the Commission's adoption of the interim policy set forth in the *Television Ownership Second Further Notice*. Second, with respect to the foreign ownership issue, as noted by the applicants, since the merger will occur at the holding company level, several levels removed from the licensee, the transaction does not implicate the direct alien investment limitation of Section 310(b)(3). Additionally, the Commission has found Fox's ownership structure consistent with Section 310(b)(4) of the Communications Act, *Fox Television Stations, Inc.* 11 FCC Rcd 5714 (1995) and, contrary to NABET's implications, has held that Fox, "as presently structured may, consistent with the public interest, acquire additional broadcast stations. . . ." *Id.* at 5728. Nothing in the record in this case suggests that the bases for this conclusion have changed. Thus, the NABET petition will be denied.

⁴ The staff has confirmed the accuracy of this audience reach determination, finding that Fox's discounted audience reach, based on the most recent data available, see NSI, "U.S. Television Household Estimate" (January 1997 estimate), would be 34.82%.

⁵ The Commission has suggested that our consent to the acquisition of stations after the adoption of the *Order* in the national ownership proceeding, see FCC 96-91 (released March 8, 1996) (implementing new national audience reach limitation of 35% as directed by the Telecommunications Act of 1996), might be conditioned on our further consideration of the UHF discount in the national ownership proceeding if compliance with the new national ownership reach of 35% after such acquisition was achieved only by virtue of the UHF discount. See *Notice of Proposed Rule Making*, FCC 96-437, ¶32, released November 7, 1996. The *Notice of Proposed Rule Making* did not suggest, however, that the Commission intended to recalculate the UHF discount for UHF stations owned prior to the adoption of the *Order*, such as those held by Fox, where no new UHF stations were being acquired. *Id.*

CONCLUSION

13. Consequently, having found the applicants qualified in all respects, we conclude that grant of the application to transfer control of New World Communications Group Inc. from NWCG (Parent) Holdings Corp. and NWCG Holdings Corp. to Fox Television Stations, Inc. will serve the public interest, convenience, and necessity.

14. Accordingly, IT IS ORDERED, That the petition to deny the transfer filed by the National Association of Broadcast Employees and Technicians, the Broadcast and Broadcast Cable Television Sector of the Communications Workers of America, AFL-CIO, Local No. 43, IS DENIED.

15. IT IS FURTHER ORDERED, That the request for permanent waiver of the duopoly rule, Section 73.3555(b) of the Commission's Rules, to permit common ownership of stations WFLD(TV) Chicago, Illinois and WITI-TV, Milwaukee, Wisconsin, IS DENIED.

16. IT IS FURTHER ORDERED, That the request for conditional waiver of the duopoly rule IS GRANTED, subject to the outcome of the Commission's pending broadcast television ownership rulemaking (MM Docket Nos. 91-221 and 87-8). Should divestiture be required as a result of that proceeding, the licensee is directed to file, within six months from the release of a final order in MM Docket Nos. 91-221 and 87-8, an application for Commission consent to dispose of such stations as would be necessary for Fox Television Stations, Inc. to come into compliance with the rules as provided in the final order.

17. IT IS FURTHER ORDERED, That the applications for consent to the transfer of control of New World Communications Group Inc. from NWCG (Parent) Holdings Corp. and NWCG Holdings Corp. to Fox Television Stations, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION



Roy J. Stewart
Chief, Mass Media Bureau