July 24, 2001

Dissenting Statement of Commissioner Gloria Tristani

Re: Transfer of Control of Broadcast Licenses Held by Subsidiaries of Chris-Craft Industries, Inc., to Fox Television Stations, Inc.

I dissent from today's decision to permit Fox to acquire ten television stations from Chris-Craft. The transfer of these television station licenses violates the Communications Act and raises serious concerns regarding the ongoing concentration in the ownership of television stations and other media. This decision also shows the lengths the Commission will go to avoid standing in the way of media mergers.

Moreover, the majority ignores the effect of the Fox/Chris-Craft merger on one of the Communications Act's fundamental purposes – maintaining a diversity of viewpoints and voices. Preserving and promoting a diverse media is essential to our democracy. Today's decision further diminishes the marketplace of ideas.

There are several significant problems with the majority's decision. First, today's decision effectively eliminates the requirement that merger applicants demonstrate to the FCC that their license transfer would serve the public interest. The majority fails to identify a single public interest benefit resulting from this merger. The Communications Act, however, directs the FCC to permit a broadcast license to be transferred *only* if "the public interest, convenience, and necessity would be served thereby."[1]

In the context of license transfers, the Commission has required merger applicants to pass a four-part test.[2] In the application before us, however, the Commission discusses only two of those four factors, the facts of which are not in dispute:

(a) **Does the transaction violate the Communications Act?** Answer: Yes, it allows a single company to own television stations that will reach more than 35% of the national audience, in violation of the 1996 Telecommunications Act.

(b) **Does the transaction violate the Commission's rules?** Answer: Yes, in three ways. The transaction violates the FCC's newspaper-broadcast cross-

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[1] 47 U.S.C. § 310(d).

[2] Just six months ago, the Commission reiterated its four-part public interest inquiry for license transfers: (1) whether the transaction would result in a violation of the Communications Act; (2) whether the transaction would result in a violation of the Commission's rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act; and (4) whether the transaction promises to yield affirmative public interest benefits. *Applications for Consent to the Transfer of Control of License and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner., Inc., Transferee,* Memorandum Opinion and Order, FCC 01-12 (rel. Jan. 22, 2001).

ownership proscription, the national television ownership cap, and the local television ownership limits.

Even using the Order's own incomplete version of the public interest test, the transaction clearly should not be approved. The decision finds that the newly-merged Fox/Chris-Craft will violate the Communications Act and the FCC's rules, and the decision identifies no offsetting benefits. Yet the majority deems this transaction to be in the public interest and proceeds to grant waivers of our most significant television ownership rules so that Fox can close its transaction.

The scope of today's decision should not be obscured by the piecemeal nature of the waivers Fox has received. Today's decision grants Fox waivers of three of the most critical broadcast ownership limitations – the national ownership cap, the television-newspaper cross-ownership restriction, and the local duopoly rule for ownership of television stations. Collectively, the grant of these waivers – and they are waivers, no matter how else they might be characterized by others -- signals that no matter how many rule violations would result from a proposed broadcast transaction, this Commission will find a way to let the deal go through. In fact, the newspaper-broadcast waiver issued today shows how far the Commission will go in order to avoid scuttling the sale of televisions stations. In seeking a waiver of the newspaper-television cross-ownership ban for New York City, Fox put forth two rationales, both of which the Order rejects. But the majority then goes on to supply reasoning Fox never even proposed and grants the waiver![3]

The Chairman's proposition in his separate statement that the public interest is demonstrated by compliance (or in the case of Fox/Chris-Craft*, expected future compliance*) with existing FCC rules is misplaced. The public interest requirement is an independent one that permeates, and is embodied in, the Communications Act. It is not vague or ambiguous as the Chairman suggests but is a standard that must be satisfied by every broadcast licensee that seeks to transfer its license. Section 310(d) states that "No construction permit or station license … shall be transferred … 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."[4] Had Congress intended to permit license transfers upon a mechanical showing of compliance with existing rules, it would have said so in the Communications Act.

The public interest requirement is also an independent one in the context of telephone mergers. There are specific pro-competition rules that are just as fundamental to the telephone industry as the ownership rules are to the broadcast industry, yet the FCC has consistently required more than mere compliance with these rules in order for telephone mergers to be approved. For example, in the Qwest-U S WEST merger, the FCC conducted an exhaustive analysis on the record to ensure that the merged entity would not violate the restriction on Bell Company provision of in-region long distance

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[3] Order at paras. 39-42.
[4] 47 U.S.C. § 310(d).

service prior to receiving 271 approval.[5] That analysis was the beginning, rather than the end, of the public interest analysis in that merger. The Commission then went on to identify specific public interest benefits to that merger.[6] Consequently, I cannot agree that mere compliance with existing rules satisfies the public interest.

Second, this Order allows a foreign corporation to control ten television stations in the United States, in violation of Section 310(b) of the Communications Act. That provision prohibits a corporation that is more than 25% foreign-owned from holding an FCC-issued broadcast license unless the FCC determines that such ownership would serve the public interest. In a pair of 1995 decisions that serve as a backdrop to today's decision, the FCC found that News Corp, a foreign-owned corporation, should be permitted (through its subsidiaries) to own U.S. television stations because: (1) Rupert Murdoch himself was an American citizen and would, through Fox Television (FTS), his majority-owned company, control the stations; and (2) because the tax consequences of not allowing News Corp to own the stations would be significant.[7]

In seeking to acquire Chris-Craft, Fox has created a new subsidiary (Newco) that is 85% owned by a foreign company, News Corp. Fox had initially planned to let Newco own the Chris-Craft stations and run them on a day-to-day basis. After receiving indications from Commission staff that the proposed structure might result in the Chris-Craft stations being under the control of the foreign-owned Newco, Fox restructured the proposed relationship in an attempt to show that Murdoch/FTS, not News Corp/Newco, would control the Chris-Craft stations.

However, the record continues to demonstrate that the Chris-Craft stations will, as a practical matter, be controlled by the foreign-based News Corp/Newco rather than by Murdoch/FTS. First, Newco controls all the assets of the 10 television stations except the bare licenses, earns 85% of the profits from those stations, and bears 85% of the economic risks. Second, Newco will perform the day-to-day operations of the stations, including making programming decisions, purchasing equipment, and employing the stations' personnel.[8] It is difficult to see how a company such as Newco that bears virtually all the economic risk of owning the television stations and that runs the stations on a day-to-day basis can be said not to control those stations. But that is what the majority concludes, and in so doing, permits foreign-owned News Corp/Newco to effectively control ten U.S. television stations without identifying a single public interest benefit.

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[5] *In the Matter of Qwest Communications International, Inc. and US WEST, Inc, Applications for Transfer of Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, FCC 00-91 (rel. Mar. 10, 2000).

[6] *Id.* at paras. 56-62.

[7] *Fox Television Stations*, 10 FCC Rcd 8452 (1995); *Fox Television Stations*, 11 FCC Rcd 5714 (1995).

[8] Letter from John Quale and Marvin Diamond, Counsel for Chris-Craft Industries, Inc. and William Reyner, Counsel for Fox Television Stations, Inc. to Magalie Roman Salas, Federal Communications Commission (Jan. 25, 2001) at 10-14.

The Fox/Chris-Craft decision confirms that this Commission will no longer give meaningful consideration to the public interest when parties wish to transfer television broadcast licenses. According to the majority, even when a proposed transaction would result in sweeping noncompliance with the Communications Act and our rules *and* where the Order itself identifies no public interest benefits resulting from the transaction, the Commission stands ready to approve the license transfer and will grant as many waivers as it takes to allow the deal to go forward. The result is another unwarranted reduction in viewpoint diversity and the marketplace of ideas. I cannot see how this result serves the public interest. For these reasons, I dissent.