

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

In the Matter of Applications of)	
)	
Shareholders of CBS Corporation)	
(Transferor))	
)	
and)	File Nos. BTCCT-19991116ABA, <i>et al.</i>
)	
Viacom, Inc.)	
(Transferee))	
)	
For Transfer of Control of CBS Corporation)	
and Certain Subsidiaries, Licensees of KCBS-TV,)	
Los Angeles, CA, <i>et al.</i>)	

ORDER

Adopted: March 16, 2001

Released: March 16, 2001

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

1. On March 9, 2001, Viacom, Inc. filed with the Commission an “Emergency Request of Viacom Inc. for Interim Relief Pending Judicial Review.” This request sought Commission action within seven days – by March 16, 2001 – to suspend the time for the company to come into compliance with the Commission’s national television ownership rule. That rule prohibits the grant, transfer or assignment of any television license to any entity if it would result in that entity having a cognizable interest in television stations with an aggregate national audience reach exceeding 35 per cent.¹

2. On May 3, 2000, the Commission granted applications to transfer control of CBS Corporation and various subsidiaries to Viacom, Inc.² Because grant of those applications would result in stations controlled by Viacom reaching 41 per cent of the national audience the Commission conditioned its grant of the transfer applications on Viacom coming into compliance with the rule within 12 months. *See Shareholders of CBS Corp.*, 15 FCC Rcd at 8247 ¶51. Viacom seeks to delay compliance with the divestiture requirement. It contends that it is likely to prevail in a pending challenge to the lawfulness of the rule itself.³ It also now argues that it would suffer irreparable injury as a result of complying with the condition. Accordingly, Viacom requests that the Commission suspend the time for the company to come

¹ *See* Telecommunications Act of 1996, Pub.L. No. 104-104, §202(c)(1) (1996), 110 Stat. 56; 47 C.F.R. 73.3555(e).

² *Shareholders of CBS Corp.*, 15 FCC Rcd 8230 (2000).

³ *See Fox Television Stations, Inc. v. FCC*, Nos. 00-1222, *et al.* (D.C.Cir.). These cases seek review of 1998 *Biennial Regulatory Review*, 15 FCC Rcd 11058 (2000).

into compliance pending the outcome of its separate challenge to the rule's lawfulness.⁴

3. To be successful on a request for the relief that Viacom seeks here, *i.e.*, a stay of the effectiveness of an agency order, or portion thereof, pending judicial review, Viacom must demonstrate that (1) it has a substantial likelihood of succeeding on the merits; (2) it would suffer irreparable harm absent grant of the relief; (3) a grant would not substantially harm others; and (4) the relief requested would be in the public interest. *See Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Applications of Cumulus Licensing Corp.*, FCC 00-391 (Jan. 17, 2001). We have considered the arguments set forth in Viacom's request in light of these standards. We conclude that it has failed to demonstrate that a postponement is justified.

4. ACCORDINGLY, IT IS ORDERED, That the "Emergency Request of Viacom Inc. for Interim Relief Pending Judicial Review" IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁴ The certificate of service on the emergency request does not indicate service on any of the petitioners to deny in *Shareholders of CBS*. Even though Viacom has filed its emergency request in the context of our 1998 Biennial Review proceeding (MM Docket 98-35), it is asking for a stay of a condition imposed in the order granting the transfer applications – not any action taken in the Biennial Review order. The petitioners to deny the transfer applications clearly should have been served as interested parties. The emergency request, therefore is procedurally defective.

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth**In Re Emergency Request of Viacom Inc. for Interim Relief Pending Judicial Review**

In my opinion, Viacom's request should have been granted.

Two weeks ago, the United States Court of Appeals for the D.C. Circuit invalidated the Commission's 30% national cable ownership cap because it was unsupported by fact and unconstitutional in application.¹ The major issue before the Court was how many subscribers a cable company may serve nationwide.² In response to that opinion, Viacom filed its emergency request seeking a stay of the 35% national broadcast ownership cap³ implemented by the Commission last year.⁴ Viacom contends that, absent a stay, it would be forced to divest valuable broadcast properties that it may have a legal right to own.

Essentially, Viacom argues that there is substantial factual similarity between the broadcast and cable caps as they both are intended to limit the audience/subscriber reach of any one company. And, like the cable ownership challenge brought by Time Warner, Viacom contends that the broadcast cap is arbitrary, based on conjecture, and an abridgement of its free speech rights. As such, Viacom states that the reasoning and holdings of the D.C. Circuit Court in the *TWE* case apply with equal force to its situation. While I reserve judgment on an ultimate review of the 35% ownership cap, I believe the facts before the Commission and the recent *TWE* decision warrant the interim relief sought by Viacom.

The 35% national ownership cap prohibits an entity from owning a communications outlet if it owns a

¹*Time Warner Entertainment Co. v. FCC*, __ F.3d __, 2001 WL 201978 (D.C. Cir. March 2, 2001) (hereinafter, "TWE" decision) (Commission rule which imposed a 30% limit on the number of subscribers that may be served by a single cable company was struck down as in excess of agency's statutory authority and as incompatible with the First Amendment.)

²The Commission's channel occupancy rule and attribution rules were also litigated in this case. The former rule was struck down as unconstitutional while portions of the latter rules were stricken as arbitrary.

³While dictated by statute, the 35% cap set the floor, not the ceiling, for national broadcast ownership. *Couple* Section 202(c)(1)(B) of the Telecommunications Act of 1996 ("The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations...by increasing the national audience reach limitation for television stations to 35 percent") with Section 202(h) of the same Act ("The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.")

⁴*Applications of Shareholders of CBS Corporation, (Transferor) and Viacom, Inc. (Transferee) for Transfer of Control of CBS Corporation and Certain Subsidiaries*, 15 FCC Rcd 8230 (2000) (Memorandum Opinion and Order) ("Divestment Order"). The 35% cap is codified at 47 C.F.R. § 73.3555(e)(1).

certain number of other outlets. The cap prevents a broadcaster from transmitting its message of choice, in its areas of choice, to its audience of choice.⁵ Viewers, on the other hand, are deprived of the chance to hear messages they otherwise would have received. Clearly, the cap imposes a direct and heavy burden on speech. The First Amendment harm is exacerbated by the fact that the Commission does not presently have any reasonable factual predicate to support a cap, much less the specific 35% cap at issue.

For these reasons, I dissent.

⁵A similar factual pattern involving a telephone company's right to provide video service to its customers was decided seven years ago. *See, e.g., Chesapeake and Potomac Telephone Co. v. U.S.*, 42 F.3d 181 (4th Cir. 1994) (invalidating, under the First Amendment, the former Act provision prohibiting telephone companies from providing video programming to subscribers within their service areas), *vacated as moot*, 116 S.Ct. 1036 (1996) (Telecommunications Act of 1996 repealed ban at issue in the litigation).