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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**FILED/ACCEPTED**

**NOV 21 2006**

Federal Communications Commission  
Office of the Secretary

In the Matter of )

K. Rupert Murdoch )  
(Transferor) )

and )

Fox Entertainment Group )  
(Transferee) )

File No.

BTCCT-20050819AAF

**OPPOSITION OF FOX ENTERTAINMENT GROUP, INC.  
AND FOX TELEVISION STATIONS, INC.**

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## SUMMARY

Fox Entertainment Group, Inc. and Fox Television Stations, Inc. (together, “Fox”) urge the Commission to dismiss the Petition for Reconsideration filed with respect to the FCC’s decision to grant consent to Fox’s proposed corporate reorganization. Procedurally, the Petition is flawed: the Petitioners lack standing to participate in this proceeding and they attempt to introduce into the record new facts and information never previously presented to the Commission. Should the Commission nonetheless consider the Petition on the merits, it will be apparent that Petitioners have failed to present any justification whatsoever for reconsidering a perfectly rational and valid grant.

Specifically, even though Fox filed its transfer of control application 14 months ago, and even though the Commission issued a public notice announcing that the application had been accepted for filing, the Petitioners did not even attempt to participate in this proceeding until after the application had been granted. In direct contravention of Section 1.106(b) of the FCC’s rules, the Petitioners neglect to offer any valid reasons for their failure to participate earlier. Although they claim not to have had adequate notice of the filing of Fox’s application, that assertion is belied by the facts. Not only did the Commission’s public notice of the acceptance of the application for filing provide Petitioners with legal, constructive notice, but Fox also provided information about the filing of the application over-the-air and via newspaper. Interested parties had more than ample opportunity (indeed, the application is readily accessible over the Internet) to review the application and to determine whether the proposed transfer of control, and Fox’s request for a temporary waiver of the newspaper/broadcast cross-ownership (“NBCO”) rule in New York, would affect their interests.

Petitioners also lack standing because they cannot demonstrate that grant of the application would cause them any actual injury. The Petition claims that because Fox owns both TV stations and a newspaper in New York, viewers are deprived of the “viewpoint diversity that the NBCO rule is designed to promote.” However, since both the Commission and the Third Circuit have concluded that the rule is not necessary to promote viewpoint diversity in markets as large as New York, it is clear that Petitioners purported injury does not exist.

Even if the Commission were to consider the Petition on the merits, it would find that there is no legal justification for setting aside the grant. Contrary to Petitioners’ claims, the FCC rationally concluded that granting Fox a temporary waiver of the NBCO rule in New York would serve the public interest. While the Petitioners assert that grant of the waiver would be detrimental to viewpoint diversity, they inexcusably ignore the Commission’s decision to repeal the NBCO rule and the Third Circuit’s affirmance of that determination. On that basis alone, the Petition should be summarily rejected. In any event, in granting Fox’s application, the FCC logically concluded that, given the exceptional diversity of the New York market and the detrimental effect on the *New York Post* of continuing uncertainty as to the applicability of the NBCO rule, a temporary waiver was fully justified.

Petitioners’ other arguments are equally baseless. Fox has fully complied with its previous temporary waivers of the NBCO rule, and at no time did it violate the Commission’s ex parte rules in this proceeding. Moreover, Petitioners’ claims regarding the quality of Fox’s programming on WWOR-TV have no place in a transfer of control proceeding and should be considered, if at all, in connection with a renewal of license.

Nonetheless, a review of the record demonstrates that Fox provides superlative service to viewers in all of the communities in which it operates. And WWOR-TV has consistently provided high-quality news, sports and entertainment programming that meets the tastes and interests of its New Jersey viewers.

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K. Rupert Murdoch	)	File No.
(Transferor)	)	
	)	BTCCT-20050819AAF
and	)	
	)	
Fox Entertainment Group	)	
(Transferee)	)	

**OPPOSITION TO PETITION FOR RECONSIDERATION**

Fox Entertainment Group, Inc. ("FEG") and Fox Television Stations, Inc. ("FTS," and together with "FEG," "Fox"), by their attorneys, hereby oppose the Petition for Reconsideration (the "Petition") filed November 6, 2006 by the Office of Communication of the United Church of Christ, Inc. and the Rainbow/PUSH Coalition (together, the "Petitioners") with regard to the above-captioned transfer of control application (the "Application").<sup>1</sup> The Commission should dismiss the Petition because it contravenes Section 1.106 of the Commission's rules (47 C.F.R. §1.106): (i) the Petitioners are not parties to this proceeding and have utterly failed to demonstrate that it was not possible for them to participate in the earlier stages of this proceeding; and (ii) the Petition relies upon facts that have not previously been presented to the Commission. The Petitioners also lack standing because they cannot demonstrate that grant of the

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<sup>1</sup> This Opposition is timely-filed pursuant to Sections 1.106(g) and 1.4(h) of the Commission's rules (47 C.F.R. §§ 1.106(g), 1.4(h)), since the Petitioners served the Petition on Fox by first-class mail.

Application causes them any actual injury. Even if the FCC were to consider the Petition on its merits, the Commission should find that the Petitioners have wholly failed to establish any legal justification for reviewing the grant of the Application.

### INTRODUCTION AND BACKGROUND

Pursuant to long-standing Commission precedent, FTS – licensee of WNYW(TV), New York, NY and WWOR-TV, Secaucus, NJ – has been controlled personally by K. Rupert Murdoch through his ownership of the stock of Fox Television Holdings, Inc. (“FTH”).<sup>2</sup> On August 19, 2005, FTS and FEG filed the Application in order to seek Commission consent to a recapitalization of the stock of FTH, which would result in a transfer of control of FTH’s license-holding subsidiaries from Mr. Murdoch to FEG. As Fox made clear in the Application, the proposed recapitalization would not result in the acquisition by any new party of an attributable interest in WNYW(TV) or WWOR-TV. The Application sought only a realignment of the voting interests of FTH’s existing shareholders.<sup>3</sup> No changes were proposed regarding the officers or directors of FTH or FTS, and Fox pointed out that no changes in the day-to-day operations of FTH or

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<sup>2</sup> See *In Re Fox Television Stations, Inc.*, 11 FCC Rcd 5714 (1995). Mr. Murdoch, a United States citizen, holds 100 percent of the issued and outstanding Preferred Stock (7,600 shares) of FTH, FTS’ corporate parent. FEG holds 100 percent of FTH’s issued and outstanding Common Stock (2,400 shares). Currently, each share of FTH Preferred Stock and each share of FTH Common Stock is entitled to 1 vote for all purposes. Thus, Mr. Murdoch controls FTH personally through his 76 percent voting interest, while FEG maintains a 24 percent voting interest.

<sup>3</sup> As a result of the reorganization, Mr. Murdoch’s voting interest in FTH will be reduced to 14.8 percent while FEG’s voting interest in FTH will increase to 85.2 percent.

FTS would occur as a result of the recapitalization. Finally, Fox explained that no party would receive any consideration as part of the reorganization.<sup>4</sup>

News Corporation, FEG's corporate parent, also owns the *New York Post* (the "*Post*"), a daily newspaper that is published at New York, NY. As part of the Application, Fox submitted an exhibit detailing why the proposed recapitalization should have no bearing on Fox's existing waivers of the newspaper/broadcast cross-ownership ("NBCO") rule permitting common ownership of the *Post* together with WNYW(TV) and WWOR-TV.<sup>5</sup> In particular, Fox explained that the proposed transaction should not affect the permanent waiver that the Commission granted to News Corporation and Mr. Murdoch in 1993 permitting common ownership of the *Post* and WNYW(TV). Noting that the waiver had enabled News Corporation to ensure the survival and subsequent expansion of the *Post* as a unique media voice, and pointing out that the New York market is exceptionally diverse and competitive, Fox also urged the Commission to modify the permanent waiver to include ownership of WWOR-TV.<sup>6</sup>

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<sup>4</sup> See Application, at Exhibit Nos. 5 and 18.

<sup>5</sup> See Application, at Exhibit No. 18. Exhibit No. 18 was submitted to the Commission as part of an amendment to the Application, which FTS and FEG filed on September 21, 2005.

<sup>6</sup> See Application, at Exhibit No. 18. The Commission first granted FTS a temporary waiver of the NBCO rule to permit common ownership of the *Post*, WNYW(TV) and WWOR-TV when FTS acquired WWOR-TV in 2001. The Commission explained that a temporary, 24-month waiver was justified in the public interest because of the "diverse nature of the New York media market, the clearly non-dominant position of the *Post* in that market, as well as the *Post*'s unique history of significant financial difficulties." See *In re UTV of San Francisco, Inc., et. al.*, 16 FCC Rcd 14975, ¶ 45 (2001) (the "*Chris-Craft Order*"). The Commission added that 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" in the event that the NBCO rule remained in effect and a sale were necessary at the conclusion of the temporary waiver period. *Id.*; see also *id.*



Alternatively, given the Commission's decision in 2003 to repeal the NBCO rule in markets such as New York – a decision upheld by the Third Circuit Court of Appeals in *Prometheus*<sup>7</sup> – Fox asked the Commission to extend at least temporarily the waiver to permit common ownership of WNYW(TV), WWOR-TV and the *Post* pending a final determination of the status of the rule following consideration of the Third Circuit remand.<sup>8</sup>

The Commission placed the Application on public notice on August 30, 2005.<sup>9</sup> Not a single individual or entity filed a petition to deny or any other objection opposing grant of the Application. Nearly 12 months later, on August 15, 2006, the Commission granted the Application; a memorandum opinion and order announcing the grant was released October 6, 2006.<sup>10</sup> In the Order, the Commission determined that the existing waivers “were granted primarily to preserve the operation of the [*Post*]” and that “competition in [New York] would not be adversely affected. The demonstrable public interest benefits that have resulted from the common ownership of these media properties

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at ¶ 50 (“It is Further Ordered, That . . . [FTS] is granted a temporary 24-month period within which to come into compliance with the [NBCO rule] . . . *insofar as it is necessary under our rules at that time.*”) (emphasis supplied).

<sup>7</sup> See *In re 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*, Report & Order, 18 FCC Rcd 13620, 13747 (2003) (“*Biennial Review Order*”); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398 (3d Cir. 2004).

<sup>8</sup> See Application, at Exhibit No. 18.

<sup>9</sup> See Public Notice, Report No. 26059 (rel. August 30, 2005).

<sup>10</sup> See *In re K. Rupert Murdoch (Transferor) and Fox Entertainment Group (Transferee)*, Memorandum Opinion & Order, FCC 06-122 (rel. October 6, 2006) (the “*Order*”).

have justified the existing waivers.”<sup>11</sup> Accordingly, the Commission left in place the permanent waiver permitting common ownership of WNYW(TV) and the *Post*. The Commission also granted FTS and News Corporation a temporary, 24-month waiver to permit continued common ownership of WWOR-TV along with WNYW(TV) and the *Post*.

The Petition, filed 14 months after Fox filed the Application, constitutes the first and only instance in which any party has objected to the proposed corporate reorganization.

**I. THE PETITION IS FATALLY FLAWED AND SHOULD BE DISMISSED, AS PETITIONERS DO NOT HAVE STANDING AND RELY UPON EVIDENCE NOT PREVIOUSLY PRESENTED TO THE COMMISSION**

**A. Petitioners Lack Standing**

Petitioners lack standing to seek reconsideration here because they have not demonstrated that they would suffer any actual injury as a result of the Commission’s decision to grant the Application. Petitioners assert that they each have members who reside in WNYW(TV)’s and WWOR-TV’s service area and who watch the stations.<sup>12</sup> Petitioners allege that these viewers are somehow harmed because the Commission’s grant deprives them of the “viewpoint diversity that the NBCO rule is designed to promote.”<sup>13</sup> The harm that Petitioners purport to suffer, however, does not exist – the Commission determined nearly four years ago that the NBCO rule is not necessary to protect viewpoint diversity, and that the rule in fact is counterproductive: “[the rule] may

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<sup>11</sup> Order, at ¶ 7.

<sup>12</sup> See Petition, at 9-10.

<sup>13</sup> *Id.*

be preventing efficient combinations that would allow for the production of high quality news coverage and broadcast programming, including coverage of local issues, thereby harming diversity.”<sup>14</sup>

In addition, the D.C. Circuit has specifically rejected the notion that there is “a *per se* rule that a person has standing to protect the ‘public interest’ by challenging any decision of the Commission regulating (or, as in this case, declining to regulate) a broadcaster in whose listening or viewing area the person lives.”<sup>15</sup> Rather, the court made clear that litigants can establish standing only if they can meet the traditional three-pronged test for standing by demonstrating injury-in-fact, a causal relationship between the purported harm and Commission action, and redressability.<sup>16</sup> The court also underscored that generalized declarations from viewers who make “broad and conclusory allegations” that a transaction will deprive them of “access to as broad a range of programming content and viewpoints as possible” are insufficient to establish standing.<sup>17</sup>

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<sup>14</sup> *Biennial Review Order*, 18 FCC Rcd at 13761-62.

<sup>15</sup> *Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003).

<sup>16</sup> *See id.* at 543 (court noting that past standing cases do not “purport to apply a more relaxed standard to audience members than to other litigants seeking to demonstrate their standing”); *see also Rainbow/PUSH Coalition v. FCC*, 396 F.3d 1235, 1240 (D.C. Cir. 2005) (“That Jones is a member of the station’s listening audience, however, does not grant ‘automatic audience standing’ to Jones, or through him to [Rainbow/PUSH], to challenge a license renewal even when it is alleged the licensee will operate contrary to the public interest. Instead, [Rainbow/PUSH] must demonstrate that it satisfies each of the three prongs of the well-established test for standing.”) (internal citation omitted).

<sup>17</sup> *Rainbow/PUSH*, 330 F.3d at 544. Further, “[a]bsent a showing that [common ownership] resulted in some actual effect upon the programming of . . . the commonly controlled stations in their markets, . . . fears of decreased diversity remain purely speculative.” *Id.* at 545. Although the *Rainbow/PUSH* cases relate to judicial standing, the Commission has made clear that its grounds its administrative standing principles in judicial standards. *See, e.g., In re Petition*

Here, the Petitioners' declarations allege no more than that common ownership deprives viewers of an additional independent voice in the abundantly diverse New York market – an allegation insufficient to establish standing.<sup>18</sup>

**B. Petitioners Have Not Shown 'Good Reason' Why They Failed to Participate Earlier in This Proceeding**

As Petitioners note, Section 405(a) of the Communications Act of 1934 permits “any . . . person aggrieved or whose interests are adversely affected” by a Commission action to seek reconsideration.<sup>19</sup> Pursuant to Section 1.106(b)(1) of the Commission’s rules, however, if a petition for reconsideration “is filed by a person who is not a party to the proceeding, it shall . . . show good reason why it was not possible for him to participate in the earlier stages of the proceeding.”<sup>20</sup> The Commission has made clear that this rule is essential to implementing the Congressional policy of ensuring “orderly disposition of the Commission’s business by establishing procedures wherein a

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*for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 F.C.C.2d 89, ¶ 19 (1980) (“in determining whether a petitioner qualifies as a ‘party in interest,’ we must apply judicial standing principles.”).

<sup>18</sup> To the degree that the Petitioners’ declarations also allege that certain viewers are dissatisfied with WWOR-TV’s news coverage, that too is insufficient to establish standing, as the Petition makes no attempt to draw a causal relationship between this purported injury and the Commission’s decision to grant consent to a transfer of control. The Petition makes no effort to show how disapproval of the recapitalization of FTH would have any impact on the types of programming broadcast by WWOR-TV. *See Rainbow/Push*, 330 F.3d at 544 (no showing of causality or redressability where litigant did not even “attempt to show that” alleged harms “had a direct effect upon the programming available to its member-viewers”).

<sup>19</sup> 47 U.S.C. § 405(a).

<sup>20</sup> 47 C.F.R. § 1.106(b)(1).

party is expected, in the normal course of events, to make his objections to a particular application known before, rather than after, Commission action on the application.”<sup>21</sup>

The Petitioners in this proceeding did not file a petition to deny – or any other objection – at any time prior to the date that the Commission granted the Application. Thus, the petitioners cannot be considered “parties” in this proceeding, and the Petition itself can be considered by the Commission only if the Petitioners can show “good reason why it was not possible” for them to participate earlier.<sup>22</sup> The Petition wholly fails to satisfy this requirement.

The Petitioners allege that they were unable to participate previously in this proceeding “because the Commission failed to provide public notice and opportunity for public comment on Fox’s requested waivers.”<sup>23</sup> That allegation is patently untrue; the Commission placed the Application on public notice on August 30, 2005 – a full 14 months before the filing of the Petition.<sup>24</sup> The public notice named the parties and identified stations WNYW(TV) and WWOR-TV by their call signs, communities of

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<sup>21</sup> *In re Selma Television Inc.*, 29 F.C.C.2d 522, 524 (1971) (citing *Valley Telecasting Co., Inc. v. FCC*, 336 F.2d 914 (D.C. Cir. 1964)); see also *Office of Communication of United Church of Christ, et al. v. FCC*, 911 F.2d 803, 808 (D.C. Cir. 1990) (“Underlying these regulations are principles of finality and exhaustion of administrative remedies. Interested persons seeking to participate in FCC proceedings are required to join the proceedings at the earliest opportunity.”).

<sup>22</sup> See *In re University of North Carolina*, 4 FCC Rcd 2780 (1989) (citing *Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984) (“[t]o qualify as a party, a petitioner for reconsideration must have filed a valid petition to deny against the application whose grant the petitioner now seeks to have reconsidered”).

<sup>23</sup> Petition, at 10.

<sup>24</sup> See Public Notice, Report No. 26059 (rel. August 30, 2005).

license and facility identification numbers. Fox also provided public notice of the filing of the Application in a New York daily newspaper and on the air on both WNYW(TV) and WWOR-TV. By any reasonable and practical measure, every potentially interested party had adequate notice that the Application had been filed. Parties also had ample opportunity to review the Application, either in the stations' local public inspection files or in the Commission's public files in Washington, D.C. (which are available on the Internet, by in-person inspection or via the FCC's copy contractor), and to thereby discover that Fox was seeking a waiver of the NBCO rule as part of a transfer of control of two television stations that, by the Petitioners' own admission, have long been the subject of third party interest.<sup>25</sup> Indeed, the Petitioners' familiarity with the Stations and the earlier waivers negates any claim that they were "unable" to participate earlier in this proceeding.

Equally important, the Commission has long made clear that a public notice announcing the filing of an application provides any interested party with all of the notice to which it is legally entitled: "From this notice, interested parties are charged with constructive notice of the subject application . . . ."<sup>26</sup> The Media Bureau, for instance, recently found that non-party petitioners for reconsideration had failed to comply with the standing requirements of Section 1.106(b) because, following the issuance of a public notice, "[w]ith the exercise of reasonable diligence, [p]etitioners had sufficient time to

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<sup>25</sup> See Petition, at 10 (noting that Petitioners themselves have a history of opposing transactions involving Fox and these stations).

<sup>26</sup> *In re High Country Communications*, 4 FCC Rcd 6237 (1989); see also *Selma Television, Inc.*, 29 F.C.C.2d at 524 ("public notice of the acceptance of the application was published by the Commission . . . . Constructive notice has, therefore, been established").

review the application to ensure that the interests they now posit were not adversely affected by the application and raise issues.”<sup>27</sup> Indeed, the non-party petitioners’ “assertion that they had no basis on which to file a petition to deny was not ‘good reason’ to justify” their failure to participate earlier, since the public notice “provided sufficient information to alert [p]etitioners that the Application could potentially impact” a geographic area about which they claimed to be interested.<sup>28</sup>

Furthermore, to the degree that the Petition can be read to assert that the Petitioners were somehow surprised by the Commission’s grant of the Application, that “is no basis for a new party to file a petition for reconsideration.”<sup>29</sup> In fact, in affirming the Commission’s position that “surprise” does not constitute “good reason” for failing to participate in a proceeding, the U.S. Court of Appeals for the D.C. Circuit emphasized: “If we were to require the Commission to accept surprise as a sufficient justification for a new party to seek reconsideration, the Commission’s – and indeed the public’s – interest in finality of licensing decisions would be eviscerated.”<sup>30</sup>

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<sup>27</sup> See *In re John Jason Bennett, et. al.*, 20 FCC Rcd 17193, 17195 (2005).

<sup>28</sup> See *id.*

<sup>29</sup> *In re Press Broadcasting Co., et. al.*, 3 FCC Rcd 6640 (1988).

<sup>30</sup> *Committee for Community Access*, 737 F.2d at 84. Petitioners fare no better in alleging that their failure to participate earlier somehow resulted because Fox did not “serve counsel for Petitioners” with a copy of the Application even though “both organizations had formally opposed the grant of a temporary waiver for WWOR in the first place.” Petition, at 10. If anything, Petitioners’ participation in the earlier proceeding makes all the more inexcusable their lack of diligence in this proceeding. Moreover, that the Petitioners had opposed a prior Fox waiver request does not signal that they would have an interest in a subsequent request filed in connection with an entirely new application. To find otherwise would require an applicant to assume that any party that had ever opposed it in the past would remain interested in the applicant’s future activities *ad infinitum*. In any event, as the Commission has made clear, “there is no requirement” that an

In short, Petitioners have failed to demonstrate that they have standing to participate in this proceeding, and the Commission should dismiss the Petition in order to maintain the orderly disposition and finality of its business.

**C. Petitioners' Reliance Upon Information Not Previously Presented to the Commission Contravenes Section 1.106 of the Rules**

Separate and apart from the Petitioners' lack of standing, the Petition also is flawed because it repeatedly relies upon on facts not previously presented to the Commission. For example, the Petition attempts to present financial statistics concerning the operation of Fox's News York media properties.<sup>31</sup> The Petition also makes a variety of claims regarding the way that Fox operates WNYW(TV), WWOR-TV and the *Post*, and about Fox's allegedly deficient efforts to sell one of the properties.<sup>32</sup> However, Section 1.106(c) of the Commission's rules (47 C.F.R. § 1.106(c)) plainly states that a petition for reconsideration that "relies on facts not previously presented to the Commission" may be granted only if: (i) the facts relate to events that have occurred or circumstances that have changed since the last opportunity to present the information to the Commission; or (ii) the facts were unknown by the petitioner until after its last

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applicant serve third parties with a copy of its application; "[i]ndeed, at the time an application is filed, there are no parties of record" in a proceeding. *See In re First Century Broadcasting, Inc.*, 100 F.C.C.2d 761, 766 (1985).

<sup>31</sup> *See* Petition, at 14.

<sup>32</sup> *See id.* at 12-15, 20-24.



opportunity to present the information to the Commission and the petitioner, through the exercise of ordinary diligence, could not have discovered the information earlier.<sup>33</sup>

The Petition makes no effort to demonstrate that any of its newly-presented information was unknown to the Petitioners earlier in this proceeding, or that the information relates to changed circumstances. The Petitioners similarly make no effort to demonstrate that consideration of these newly-presented facts “is required by the public interest.”<sup>34</sup> Accordingly, the Commission should refuse to consider the Petition insofar as it relies upon facts not previously presented for review.

## **II. THERE IS NO BASIS FOR THE COMMISSION TO RECONSIDER ITS DECISION TO GRANT THE APPLICATION**

Even if the Commission were to consider the merits of the Petitioners’ claims, notwithstanding the fatal procedural flaws of the Petition, the Commission still would find no basis for reconsidering its decision to grant the Application. It is axiomatic that “[r]econsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters.”<sup>35</sup> As described above,

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<sup>33</sup> See 47 C.F.R. § 1.106(c). The provision provides an exception to the general rule that permits the Commission to consider facts not previously presented to it when “required in the public interest.” 47 C.F.R. § 1.106(c)(2).

<sup>34</sup> See *id.*; see also *Winstar Broadcasting Corp.*, 20 FCC Rcd 2043, 2050 (2005) (petitioner has the burden of demonstrating that consideration of new facts is “required in the public interest”).

<sup>35</sup> See, e.g., *In re Eagle Radio, Inc.*, 12 FCC Rcd 5105, 5107 (1997) (citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff’d sub nom., Lorraine Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965) (subsequent history omitted)).

Petitioners cite to no new information that was unknown or undiscoverable. More importantly, the Petition does not identify any material errors or omissions in the Order.

Petitioners essentially proffer three arguments in an effort to show that the Order contains a material error: (1) that the Commission should have provided notice of the Application above and beyond the public notice contemplated by the Communications Act; (2) that the decision to grant Fox a waiver of the NBCO rule was based on incorrect facts; and (3) that the grant of a waiver was arbitrary and capricious.<sup>36</sup>

First and foremost, as fully explained above, the Commission provided interested parties with all of the notice to which they are legally entitled. Petitioners' state the obvious in noting that the Administrative Procedure Act ("APA") requires an agency to give interested parties notice of agency actions and opportunity to participate in adjudicatory proceedings.<sup>37</sup> It is equally clear, however, that issuance of a public notice of the filing of an application provides parties with the notice required by the APA.<sup>38</sup> As the Commission has noted: "A public notice . . . is adequate if it alerts interested parties to documents which would allow them to determine whether their interests were implicated."<sup>39</sup> Moreover, "the Commission has wide latitude regarding the information

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<sup>36</sup> See Petition, at 11-16.

<sup>37</sup> See *id.*, at 11.

<sup>38</sup> See *Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289, 1295 (D.C. Cir. 1989).

<sup>39</sup> *In re WinStar Wireless, Inc.*, 14 FCC Rcd 20533, 20537 (1999).

included in a public notice, provided that the notices gives 'fair warning' of the scope of the described action."<sup>40</sup>

In this proceeding, the Commission issued a public notice on August 30, 2005 announcing that the Application had been accepted for filing. The public notice, which named the parties involved and detailed the stations' calls signs, facility identification numbers and their communities of license, provided the Petitioners, and the public at large, with constructive notice of this proceeding.<sup>41</sup> Consequently, the Petitioners' allegation that "the FCC failed to give interested parties the opportunity to submit facts and arguments" in this proceeding is simply not true.<sup>42</sup> Members of the public had 30 days following the date of the public notice to file a petition to deny the Application, not to mention 14 months between the date of public notice and the Commission grant during which to interpose an informal objection. And by advising the public that Fox was seeking consent to a transfer of control involving WNYW(TV) and WWOR-TV, the public notice itself provided sufficient information to alert Petitioners that their interests might be implicated by the Application.

Second, Petitioners quarrel with the Order's conclusion that the Application was unopposed. Petitioners claim that the Application was opposed because

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<sup>40</sup> *In re KOLA, Inc.*, 11 FCC Rcd 14297, 14310 (1996) (internal citations omitted). The D.C. Circuit also has made clear that notice is "fully sufficient to satisfy statutory and constitutional standards" when the FCC by practice issues public notices that "require interested parties to determine for themselves" whether an application implicates an issue of concern to them. *Hispanic Information & Telecommunications Network*, 865 F.2d at 1295. See also *Thomas W. Tittle*, 5 FCC Rcd 1196, 1197 (1990) (interested parties must exercise reasonable diligence in reviewing public notices).

<sup>41</sup> See *In re High Country Communications*, 4 FCC Rcd at 6237.

<sup>42</sup> Petition, at 11.

Free Press submitted an untimely opposition to Fox's request, filed in a separate proceeding in September 2004, to modify the NBCO rule waiver with respect to WWOR-TV.<sup>43</sup> It is undisputed, however, that neither Free Press nor anyone else ever filed an objection (petition to deny or otherwise) with regard to the Application itself. The mere fact that Free Press has objected to a Fox waiver request in a different proceeding does not magically result in the Application becoming "opposed," and Petitioners cite no authority for their attempt to boot-strap Free Press' separate opposition into the record of this proceeding. In fact, Free Press' opposition and, as the Commission itself noted, the waiver request, remain pending and await FCC action: "To the extent that FTS has other requests for extension of the temporary waiver for WWOR-TV pending before the Commission, those requests remain pending."<sup>44</sup>

Finally, the Petition alleges that the Commission acted arbitrarily and capriciously in granting Fox a new 24-month temporary waiver of the NBCO rule with respect to WWOR-TV.<sup>45</sup> Petitioners specifically assert that grant of the Application and waiver is contrary to the public interest.<sup>46</sup> Quite remarkably, however, the Petition ignores the Commission's determination nearly four years ago to repeal the NBCO rule on the basis that the rule disserves the public interest in media markets as large and diverse as New York.<sup>47</sup> Although repeal of the rule has been stayed by the U.S. Court of

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<sup>43</sup> See *id.*, at 12.

<sup>44</sup> Order, at ¶ 7, n. 8.

<sup>45</sup> See Petition, at 12.

<sup>46</sup> See *id.*, at 12-13.

<sup>47</sup> See *Biennial Review Order*, 18 FCC Rcd at 13747.

Appeals for the Third Circuit, even the court recognized that “reasoned analysis supports the Commission’s determination that the blanket ban on newspaper/broadcast cross ownership was no longer in the public interest.”<sup>48</sup> Regardless of how the Commission revises its media ownership rules in the currently-pending quadrennial review proceeding, there can be no question that continued application of the newspaper/broadcast cross-ownership ban to New York, the nation’s largest media market, would disserve the public interest.

In any event, the Commission made a perfectly rational decision in the Order to provide Fox an additional 24-month period during which common ownership of the *Post*, WNYW(TV) and WWOR-TV is permissible. As the Petition itself explains, among the tests that the Commission applies when evaluating a request for waiver of the NBCO rule is the overriding question of whether, “for whatever reason, the purposes of the rule would be disserved by its application.”<sup>49</sup> And the Commission rationally determined that the record continues to reflect both that New York is exceptionally diverse and competitive and that a temporary waiver is necessary to ensure that News Corporation will have sufficient regulatory certainty to continue to invest in and preserve the *Post* as a unique media voice.<sup>50</sup> The FCC also found that “demonstrable public interest benefits . . . have resulted from the common ownership of” the *Post*, WNYW(TV) and WWOR-TV.<sup>51</sup> Thus, the Commission reasoned that it was acting to “ensure that the

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<sup>48</sup> *Prometheus*, 373 F.3d at 398.

<sup>49</sup> Petition, at 13 (citations omitted).

<sup>50</sup> See Order, at ¶ 8

<sup>51</sup> *Id.*, at ¶ 7.

very purpose of the rule – to preserve competition and existing service to the public – is not disserved by a forced divestiture . . . in a market more than sufficiently competitive to withstand the harms the rule was designed to prevent.”<sup>52</sup>

The Commission need not become bogged down by Petitioners’ further claim that Fox failed to meet its “burden” to “show an inability to sell” one of its New York media outlets (or to show that the New York market cannot support separate ownership).<sup>53</sup> Because in the Order the Commission granted Fox a temporary waiver pursuant to its broad discretionary authority, the Petitioners’ contentions (and the accompanying financial statistics purporting to demonstrate the *Post*’s financial improvement) are inapposite. That information would be relevant, if at all, only if Fox were seeking a waiver on the grounds that sale of one of its New York media outlets was not possible.<sup>54</sup>

Likewise, Petitioners have no basis to claim that the record fails to support the Commission’s stated justifications for granting the Application.<sup>55</sup> The Petition suggests that the Commission cannot base the waiver on a desire to avoid a “fire sale” because Fox “has already had five years to divest one of its properties, more than enough time to avoid a depressed sale.”<sup>56</sup> As noted above, the Order clearly justifies its grant of the waiver on the unique diversity of the New York media market and the “financial

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<sup>52</sup> *Id.*, at ¶ 8.

<sup>53</sup> Petition, at 13-14.

<sup>54</sup> Accordingly, the Petition’s reliance on *Counterpoint Communications*, 20 FCC Rcd 8582 (2005), is misplaced. See Petition, at 14.

<sup>55</sup> See *id.*, at 15-16.

<sup>56</sup> *Id.*, at 15.

vitality” of the *Post*.<sup>57</sup> Thus, contrary to Petitioners’ assertion, the FCC in the Order did not grant the waiver to avoid a “fire sale,” but rather to “provide sufficient certainty to assure that FTS and [News Corporation] will continue to take appropriate action or expend necessary capital to preserve and expand the [*Post*] without a concern that it would have to forfeit that investment by closing the newspaper or by a forced sale . . . at an artificially depressed price to achieve compliance with the multiple ownership rules.”<sup>58</sup>

Moreover, Petitioners’ arguments ignore that at the time the FCC initially granted FTS a waiver of the NBCO rule with respect to WWOR-TV in 2001, the Commission recognized that the waiver could be mooted by the repeal of the rule itself. The FCC expressly acknowledged in the *Chris-Craft Order* that the rule might not outlast the 24-month waiver: “[i]f our rules 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.”<sup>59</sup>

Sure enough, two months before the initial temporary waiver was set to expire, the Commission decided that the NBCO rule was contrary to the public interest.<sup>60</sup> Only a blanket stay issued by the Third Circuit with respect to all of the media ownership

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<sup>57</sup> Order, at ¶ 8.

<sup>58</sup> *Id.*

<sup>59</sup> See *Chris-Craft Order*, 16 FCC Rcd at ¶ 45, n. 73. In the ordering clause, the Commission also stressed: “It is Further Ordered, That . . . [FTS] is granted a temporary 24-month period within which to come into compliance with the [NBCO rule] . . . *insofar as it is necessary under our rules at that time.*” *Id.*, at ¶ 50 (emphasis supplied).

<sup>60</sup> See *Biennial Review Order*, 18 FCC Rcd at 13747.

rules has prevented repeal of the NBCO rule. Fox continues to believe that the Commission's decision to repeal the rule, together with the Third Circuit's affirmation that the rule disserves the public interest in markets as large as New York, warrants granting Fox a permanent waiver to own the *Post*, WNYW(TV) and WWOR-TV. Absent modification of the permanent waiver, however, fairness requires, to prevent unnecessary divestiture, that the Commission extend the temporary waiver at least until the fate of the rule is finally determined (whether pursuant to the Third Circuit's remand decision or via the quadrennial review).

As Fox has explained repeatedly, it would be highly inequitable to force a sale of any of its New York media properties when the Commission and the courts agree that, at least in a market like New York, the NBCO rule fails to serve the public interest.<sup>61</sup> Accordingly, it was perfectly reasonable for the Commission to conclude that the facts and circumstances warrant permitting Fox to own the *Post*, WNYW(TV) and WWOR-TV for an additional 24 months.<sup>62</sup>

### **III. PETITIONER'S AD HOMINEM ATTACKS ON FOX ARE UTTERLY LACKING IN MERIT**

#### **A. Fox Has Consistently Complied with Commission Orders and Worked to Advance FCC Policy Objectives**

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<sup>61</sup> See, e.g., Application, at Exhibit No. 18.

<sup>62</sup> Insofar as the Petition attempts to argue (at 16) that Fox has failed to prove that common ownership of all three outlets is necessary "to the survival of the *Post*," the Commission should reject this attempt to stand Fox's waiver request on its head. Fox did not argue that common ownership of all three outlets is a prerequisite for the *Post*'s survival. Rather, Fox has said that without regulatory certainty, it cannot continue to make the kinds of long-term investments that the newspaper needs to survive, and that a forced sale when the Commission already has decided to repeal the NBCO rule would be inequitable.



Notwithstanding the Commission's decision, affirmed by the Third Circuit, that the NBCO rule is no longer necessary in the public interest, Petitioners recklessly assert that Fox "disregarded the *Chris-Craft Order* and did not come into compliance with the NBCO rule."<sup>63</sup> They further claim that this "refus[al] to comply with the Commission's orders illustrates that [FTS] is an unreliable licensee."<sup>64</sup> However, these attacks are simply not supported by the record. Fox has complied at all times with the Commission's directives or otherwise sought appropriate relief. FTS was and continues to be an exemplary licensee that is committed to serving its local broadcast communities.

Petitioners seek to make much of the fact the *Chris-Craft Order* directed FTS to come into compliance with NBCO rule within two years and, at the end of that 24-month period, FTS and its related entities still controlled WNYW(TV), WWOR-TV and the *Post*. Yet Petitioners completely disregard the intervening history and the fact that the Commission's order was limited to compliance "*insofar as it is necessary under [the FCC's] rules at that time . . .*"<sup>65</sup>

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<sup>63</sup> Petition, at 17.

<sup>64</sup> *Id.*

<sup>65</sup> *Chris-Craft Order*, 16 FCC Rcd at ¶ 50 (emphasis supplied). The Commission further noted in the *Chris Craft Order* that "[i]f 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." *Id.*, at ¶ 45, n.73. This language clearly reflects that Fox was reasonable in contending that the *Chris-Craft Order* contemplates at least two possible outcomes: an orderly sale of one of the New York media properties or a change in the NBCO rule. Petitioners' suggestion (at 18) that the only reason for the waiver was to promote an orderly sale, and that Fox "lacks candor" for claiming otherwise, is utterly without foundation and entirely at odds with the history of Fox's ownership of the stations and the *Post*. Petitioners' request for an examination of Fox's fitness to remain a licensee should be rejected out of hand.

Given that Fox consummated its acquisition of the Chris-Craft transaction on July 31, 2001, absent intervening events, Fox would have been required to comply with the NBCO rule as in effect on July 31, 2003. As noted above, however, on June 2, 2003, the Commission voted to eliminate the prohibition on cross-ownership of newspapers and broadcast outlets in markets as large and diverse as New York.<sup>66</sup> The Commission concluded that the NBCO rule may actually harm its localism goal without benefiting competition or diversity.<sup>67</sup> The decision obviated the need for Fox to divest any of its New York media outlets and ensured that the FCC's localism objectives would be more fully realized, especially in the diverse New York media market.

Fox recognized, though, that the repeal of the NBCO rule in New York would not become effective by July 31, 2003, because of the requirement that the *Biennial Review Order's* revisions to the media ownership rules first appear in the *Federal Register*.<sup>68</sup> Therefore, out of an abundance of caution, Fox timely sought a brief extension of its NBCO waiver on July 21, 2003, asking that the waiver be temporarily extended until the new rules could take effect.<sup>69</sup> The new ownership rules encountered even greater delay, however, when several parties sought judicial review of the

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<sup>66</sup> *Biennial Review Order*, 13 FCC Rcd at 13940.

<sup>67</sup> *See id.*

<sup>68</sup> Specifically, as noted in the ordering clauses of the *Biennial Review Order*, "the ownership requirements and rules adopted in this *Report and Order* shall become effective thirty (30) days after publication of the text or summary thereof in the *Federal Register* . . ." *Biennial Review Order*, 13 FCC Rcd at 13874.

<sup>69</sup> *See* Letter from John C. Quale to W. Kenneth Ferree, Chief, Media Bureau, Federal Communications Commission, dated July 21, 2003. Petitioners' allegation that "Fox falsely certifie[d] 'that the proposed transfer complies with the Commission's . . . cross-ownership rules,'" Petition, at 18, is unsupported by the record and ignores the analysis contained in Exhibit No. 18 to the Application.

Commission's decision. The Third Circuit ultimately affirmed the FCC's conclusion that the NBCO rule fails to serve the public interest, but the court issued a blanket stay precluding all of the new rules from going into effect while the Commission addressed other ownership issues on remand.<sup>70</sup>

As the above facts confirm, Fox has always abided by the Commission's orders or has timely sought extension and/or modification of its waiver consistent with FCC policies. Contrary to Petitioners' wholly unsupported assertion, Fox has never refused to comply with a Commission order. Fox's conduct with respect to the NBCO rule is well documented, and there is no basis for further investigation by the FCC.

**B. Fox's Contact with the FCC at All Times Has Been Consistent with Its Ex Parte Rules**

Section 1.1208 of the Commission's rules sets forth proceedings in which ex parte presentations are prohibited, so-called restricted proceedings, which normally include applications under Title III of the Communications Act.<sup>71</sup> However, the rule also provides an exemption that permits contact between applicants and the FCC in restricted proceedings that involve only a single party.<sup>72</sup> In a proceeding involving only one party, "the party and the Commission may freely make presentations to each other because there is no other party to be served or with a right to have an opportunity to be present."<sup>73</sup> As demonstrated above, the Application was unopposed and, therefore, the ex parte rules

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<sup>70</sup> See *Prometheus*, 373 F.3d at 398, 435.

<sup>71</sup> See 47 C.F.R. § 1.1208.

<sup>72</sup> See 47 C.F.R. § 1.1208, Note 1.

<sup>73</sup> *Id.*

did not preclude Mr. Murdoch or Fox from discussing the Application with the Commission. No further investigation is warranted.

**IV. WWOR-TV'S SERVICE TO NEW JERSEY AND ITS OTHER VIEWERS, WHICH EXCEEDS ITS OBLIGATIONS AS A LICENSEE, IS IRRELEVANT TO THIS PROCEEDING**

With scarcely any effort to relate its contentions to the recapitalization of FTH, Petitioners also argue that the Commission on reconsideration should examine WWOR-TV's service to New Jersey. Petitioners suggest that WWOR-TV's New Jersey service obligations would somehow have relevance to the consideration of the request for waiver of the NBCO rule.<sup>74</sup> Quite clearly, the station's service to New Jersey has no relevance either to the request for waiver or the recapitalization of FTH. The Petitioners' arguments as to WWOR-TV, like the remainder of their Petition, should be dismissed. WWOR-TV's service to New Jersey is relevant, if at all, only to an application for renewal of the station's license.

In any event, Fox is mindful of its obligations to its New Jersey audience and has consistently sought to exceed its obligations as a licensee and its viewers' expectations. WWOR-TV is committed to a significant physical presence in New Jersey and provides programming to address issues unique to the state. WWOR-TV operates its main studio out of its Secaucus facility, which also serves as the headquarters for WWOR-TV's substantial news-gathering organization. Staffing WWOR-TV's news department are 80 full-time personnel, including news managers, news anchors, sports reporters, weathercasters, reporters, editors, and photographers. WWOR-TV also maintains a satellite news gathering truck for both WWOR-TV and WNYW(TV) at the

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<sup>74</sup> See Petition, at 20.

Secaucus facility, as well as five other live news trucks to service both stations' New Jersey news requirements.<sup>75</sup>

Petitioners cite to WWOR-TV's My9 website to suggest that the station is not adequately serving its New Jersey audience.<sup>76</sup> A website, however, is irrelevant to whether a station complies with any FCC programming obligations. In any case, Fox maintains that its *broadcast* content confirms its commitment to its New Jersey viewers. Nevertheless, to correct Petitioners erroneous characterization, the website does in fact address WWOR-TV's New Jersey audience. The site's public affairs section says:

As part of the on-going commitment to New Jersey, My9 is proud to present Ask Congress, a weekly half-hour, news interview series featuring Representatives of the New Jersey Congressional delegation. Hosted by My9 News at 10 Weekend Anchor Lynda Lopez, the program airs each and every Sunday at noon.

...

And we want you to participate as well. Viewers are encouraged to submit questions for each Member of Congress to be asked during the show. Please send all questions about issues facing New Jersey to Ask Congress, and be sure to watch Ask Congress every Sunday.<sup>77</sup>

WWOR-TV continues to meet and exceed its public interest obligations and the Commission should reject Petitioners' unsupported request for further investigation.

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<sup>75</sup> See Declaration of Molly Pauker, attached hereto as Exhibit A. Furthermore, as reflected in WWOR-TV's issues/programs lists, WWOR-TV broadcasts a substantial amount of New Jersey-oriented news and public affairs programming. For instance, WWOR-TV offers a bi-weekly program entitled, "New Jersey Matters," which focuses on New Jersey political, cultural, and economic issues. The station's evening news programming also provides substantial coverage of New Jersey issues, including analysis of political developments in Trenton. Finally, it offers special programming that provided in-depth coverage and analysis of significant events affecting New Jersey and its residents. *See id.*

<sup>76</sup> See Petition, at 23.

<sup>77</sup> See <http://www.my9ny.com/public-affairs/pa-programs.html> (last visited November 20, 2006).

## CONCLUSION

As a preliminary matter, the Petition is procedurally defective. Petitioners lack standing and their belated attempt to challenge the Order fails to show "good reason" why it was not possible for them to participate earlier and relies on evidence not previously presented to the FCC. Furthermore, even if the Commission overlooked these fatal procedural flaws, there is no valid basis for the agency to reconsider its decision to grant the Application. The Petition cites no new information that was unknown or unknowable nor does it identify any material errors or omissions. Finally, Petitioners' unfounded, indeed reckless, personal attacks and request for further investigation ignore FTS' consistent compliance with FCC rules and exceptional service to its communities of license and should be summarily dismissed.

Respectfully submitted,

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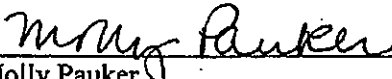
Their Attorneys

DECLARATION

I, Molly Pauker, hereby state as follows:

1. I am Vice President of Fox Television Stations, Inc, licensee of WWOR-TV, Secaucus, New Jersey, and WNYW(TV), New York, New York.
2. WWOR-TV operates its main studio out of its Secaucus facility, which also serves as the headquarters for WWOR-TV's substantial news-gathering organization. WWOR-TV's news department is staffed with 80 full-time personnel, including news managers, news anchors, sports reporters, weathercasters, reporters, editors, and photographers. WWOR-TV also maintains a satellite news gathering truck for both WWOR-TV and WNYW(TV) at the Secaucus facility, as well as five other live news trucks to service both stations' New Jersey news requirements.
3. Furthermore, as reflected in WWOR-TV's issues/programs lists, WWOR-TV broadcasts a substantial amount of New Jersey-oriented news and public affairs programming. For instance, WWOR-TV offers a bi-weekly program entitled, "New Jersey Matters," which focuses on New Jersey political, cultural, and economic issues. In addition, WWOR-TV's evening news programming provides substantial coverage of New Jersey issues, including analysis of political developments in Trenton, New Jersey. Finally, WWOR-TV offers special programming aimed at providing in-depth coverage and analysis of significant events affecting New Jersey and its residents.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 21, 2006.

  
\_\_\_\_\_  
Molly Pauker  
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### Certificate of Service

I, Malcolm J. Tuesley, hereby certify that on this 21st day of November 2006, a copy of the foregoing Opposition of Fox Entertainment Group, Inc., and Fox Television Stations, Inc., was served by first-class mail, postage prepaid, upon the following:

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In addition, I have provided courtesy copies via email to all individuals listed below.

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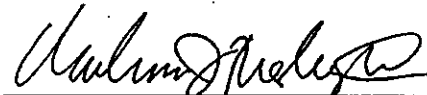
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