

**CONCURRING STATEMENT  
OF  
COMMISSIONER JAMES H. QUELLO**

**RE: FOX TELEVISION STATIONS, INC.  
RENEWAL OF LICENSE OF STATION WNYW-TV**

With the millions of words of information, vituperation, and speculation that have already been expended on this matter, one may well wonder why at this juncture I find it necessary to carry more verbal coals to this particular Newcastle. The answer is easy: in this welter of words, perhaps the only perspective on these events that has not been presented is mine, the only Commissioner still sitting who participated in the unanimous 1985 Commission vote on the Fox applications.

The time has come to give you my perspective. I can support this item, except for the decision to call for yet more comment prior to determining whether to waive Section 310(b)(4)'s foreign ownership limitations on behalf of Fox. In my view, the record as it stands today amply supports a decision to waive the statute's 25 percent benchmark without the need for further comment.

I have not spoken in detail of what went into my decision to approve the assignment of the Metromedia licenses to Fox in 1985 for several reasons. Chief among them, of course, was the allegation that, at the time of the Commission vote or at some point thereafter, Fox could have either intentionally misled or failed to be forthcoming with the Commission on the question of its ownership structure. If true, these allegations would have naturally required a reexamination of the public interest determination that I had previously made. I have therefore deliberately withheld final judgment pending the results of the staff's investigation into these matters.

That investigation has been exhaustive, and its results are now in. I have reviewed it carefully. It confirms the basis for my determination in 1985 that granting the applications would serve the public interest. Perhaps just as important, however, in my view the record also validates the key factors that would enable this Commission to make a similar public interest judgment today. The first key factor is that Fox is controlled both in law and in fact by an American citizen. The other key factor that was decisionally significant to me was that in approving the applications the Commission would finally be creating the long-sought but hitherto-unattained fourth broadcast network.

I fully agree with the finding that Fox was not guilty of either misrepresentation or lack of candor in presenting its proposed ownership structure to the Commission ten years ago. Although I cannot speak for other members of the Commission or for the staff, I for one was never in any doubt about what Fox intended for one very simple reason:

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I asked. I asked, and Fox gave me what I considered then, and consider now, to be a perfectly frank response: that Rupert Murdoch, an American citizen, would control 76 percent of the voting stock of Fox. For that reason, it was, and still is, immaterial to me whether all, or part, of the equity ownership of the company resided with Fox's parent, News Corp. The item before us today finds that what I found to be true in 1985 continues to be true in 1995: Mr. Murdoch is, and has at all times been, in both de facto and de jure control of Fox.

Similarly, the creation of the fourth broadcast network was, and is, an overarching public policy goal that has been served by the creation of Fox. There is extensive factual evidence in the record about how clearly and compellingly News Corp.'s economic participation in the Fox structure over the last ten years has served the Commission's fundamental policy objectives of economic competition and viewpoint diversity. First, and most fundamentally, the Commission's approval of the applications in 1985 provided the physical infrastructure and economic foundation for the creation of the fourth national broadcast television network.<sup>1</sup> The Commission fully expected the Fox acquisition to lead to the development of this network.<sup>2</sup> And sure enough, the creation of the Fox station group and the emergence of the Fox Network has advanced the Commission's objective of providing competition to the established national broadcast networks and their affiliates.<sup>3</sup> The Fox Network has provided economic, programming, and marketing support to enable many independent UHF stations to achieve stability and profitability.<sup>4</sup> The presence of Fox has also enhanced the value and bargaining power of local affiliates of all networks in many markets.<sup>5</sup> Fox has increased the amount of locally-produced news programming on its owned stations<sup>6</sup> and made possible the expansion or creation of local news programming by Fox affiliates.<sup>7</sup> In the last four years, the number of Fox affiliates presenting local prime-time newscasts has increased from 15 to 50.<sup>8</sup> Anchored by the Fox-owned stations, the Fox Network also presents 19 hours per week of children's programming, including three hours per week of informational and

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<sup>1</sup>*Fox Comments, February 27, 1995 (hereinafter, "Fox Comments") at 76-79.*

<sup>2</sup>*See, e.g., Denvir Tr. at 41 (Chairman Fowler sought creation of a fourth network to compete with the three established networks).*

<sup>3</sup>*Fox Comments at 79-80.*

<sup>4</sup>*Id. at 80-83.*

<sup>5</sup>*Id. at 88.*

<sup>6</sup>*Id. at 84.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id. at 84-85 and Appendix D.*

educational programs.<sup>9</sup>

It is also significant to note that Fox has increased the amount of programming addressing the interests of African Americans and other minorities.<sup>10</sup> In the process, Fox has provided a national platform for minority producers, writers, actors and other members of the creative community.<sup>11</sup> Indeed, even while the local Metropolitan Council of the NAACP was attacking Fox before the Commission, the Fox Network was being honored by the national NAACP with 22 Image Award nominations for its programming! In fact, Fox held a **majority** of the nominations in three of the Image Award categories.<sup>12</sup> Last - but certainly far from least - the Commission itself has previously acknowledged the public interest benefits that have resulted from Fox's activities.<sup>13</sup>

Notwithstanding how strongly the factors of American control and the creation of the fourth network counted in favor of approving the Fox acquisition, however, one might question whether, in voting to grant the applications in 1985, I unwittingly gave short shrift to the possibility that News Corp.'s capital contributions to Fox might substantially exceed the 25 percent benchmark. Here again, the item confirms my analysis at that time. The item before us shows that in 1985 the Commission had not clearly ruled that we would count a parent corporation's capital contributions in determining a subsidiary corporation's compliance with the 25 percent benchmark, making an explicit waiver necessary if they exceeded that amount. Indeed, the item demonstrates that the Commission's precedent on counting equity ownership since 1985 is perhaps most politely characterized as a moving target.

So in my judgment, in 1985 Fox did not need anything explicitly waived. To the extent its possible ownership structure was disclosed and before us for approval - which it was - I made an informed decision to approve it. In doing that I fully considered the issue of who was going to exercise control of the company, and I believed then, as I do now,

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<sup>9</sup>*Id.* at 87.

<sup>10</sup>*Id.* at 89.

<sup>11</sup>*Id.*

<sup>12</sup>*Fox Response to Supplement to Petition to Deny, December 2, 1993 at 11-12.*

<sup>13</sup>*See Fox Broadcasting Co., 5 FCCRcd 3211, 3213-14 (1990) (emergence of the Fox Network advanced the Commission's "longstanding" and "oft-stated" public interest goals of "fostering a competitive UHF service," "encouraging new national networks," and promoting "more, and more diverse, children's programming"); Evaluation of the Financial Interest and Syndication Rules, 8 FCC Rcd 3282, 3333 (1993) (Fox "has greatly enhanced" both source and outlet diversity).*

that the creation of the fourth network was a compelling public interest goal. From this perspective, it matters little either in law or in logic that the words "waiver" and "benchmark" were not explicitly used in 1985 in reference to the possible equity ownership structure. I knew what the decisionally significant issues were. They were the same issues that would have been decisionally significant had they been couched in terms of a waiver. I made my decision based on them.

Which brings me squarely to today. I understand that the vagaries of our evolving precedent and the need to tidy up our regulatory desks might warrant this Commission's desire to use the correct legal incantations to waive the benchmark. I am perfectly willing to do this. More to the point, I am perfectly willing to do this today.

Throughout the ten-year period in which Fox has been a licensee, there has never been, and there is not now, even the slightest implication of any foreign influence, much less "undue" foreign influence, over the management and operations of Fox. Given that the prevention of such undue foreign influence is the very reason the alien ownership provision was enacted, to do anything short of granting Fox any waiver that might now be necessary strikes me as a solution in search of a problem. In my view the record unequivocally shows that Fox is operating in the public interest notwithstanding its not being in compliance with a statutory interpretation that post-dates the Commission's 1985 decision by ten years. From this perspective, it seems pointless to spend much effort wondering what it might cost Fox to bring itself into compliance. For if Fox is operating in the public interest under its current ownership structure, it stands to reason that any costs Fox would incur to change this structure would not be required in the public interest. Under those circumstances, for us to impose such costs would be, by definition, unnecessary, arbitrary and capricious.

I can imagine some possible arguments that might be made in favor of requiring Fox to achieve a greater degree of compliance with the 25 percent benchmark. It could, for example, be argued that we have never before waived the 25 percent benchmark in a broadcast case, and to do it here - where virtually all the equity ownership is in the hands of News Corp. - would simply be too big a step to take.

I have not found any Commission precedent to support the notion that the Commission can only grant waivers incrementally. The reason for this is simple: if a licensee happens not to be complying with one of our rules and the public interest is nevertheless being well-served, why enforce that rule against that licensee at all? This is particularly persuasive in this case, where the statutory interpretation in question was made a decade after the applicant began operating and where it can be documented that the applicant has been operating in the public interest. Why mess with success?

Then there could be the related argument that, if we grant a waiver of this magnitude now, how can we possibly deny any waiver request in the future? And I suppose my answer here is, bring me another waiver request that exhibits the same unique



circumstances as this one, including an American-controlled licensee operating the fourth network for ten years under apparent statutory authority, and I undoubtedly would feel constrained to grant the same relief. Suffice it to say, however, that I for one am not lying awake at night worrying that such an unlikely waiver applicant is apt to land on our regulatory doorstep. And in the meantime, I would propose that we proceed with any future waiver requests that do not feature the unique circumstances pertaining to this case exactly as we always have and always will - on a case-by-case basis. Granting the waiver in this case will affect that approach, and the outcomes of those future cases, not one iota - unless, as I say, some future waiver applicant manages to wind up in precisely the same set of circumstances that Fox is in today - a highly unlikely, if not impossible, scenario.

The above analysis would also apply to what might be characterized as the "Aha, but suppose something changes?" argument. The gist here would be that, even if the current Fox ownership structure is serving the public interest, what happens if Mr. Murdoch chooses to retire? Then what? The simple answer is that, when and if something material changes, the Commission will have the opportunity to approve any change, or disapprove any change, or even change any change, in the normal course of our customary assignment and transfer processes. There is no need at this juncture to fix what isn't broken.

So my bottom-line analysis of the waiver issue goes something like this. On the one hand, we have Fox. Fox obtained all the authorizations needed at the time to establish its broadcast network in 1985. We find Fox to be in the complete control of an American citizen. Although its parent corporation is a foreign entity and owns virtually all its corporate equity capital, Fox has never at this or at any other time been found to be under any influence whatsoever from its parent. Moreover, under its current corporate structure Fox has injected new competitive vitality into the television broadcast marketplace, and in doing so has been found by this Commission to be meeting the public policy goals we had in authorizing its station acquisitions.

On the other hand, we have a law. As of today, the Commission is interpreting this law to bar foreign corporations from holding more than 25 percent of the capital stock in domestic corporate broadcast licensees. The purpose of this law is to assure that such foreign entities do not exert undue control over the programming and other operational activities of broadcast licensees or otherwise prevent them from operating in the public interest. This law did not clearly apply to Fox's equity ownership structure until ten years after we approved the acquisitions with which Fox launched a fourth American broadcast network. Finally, this law has always been waivable upon a persuasive showing that, under the facts of an individual case, exceeding the 25 percent benchmark would serve the public interest.

In deciding this waiver issue I must confess that I am not a lawyer, so my approach to communications problems is perhaps somewhat different, although I do have expert legal

advisors. So I tend to ask where, in any given matter, do reason and justice predominate? Which viewpoint scores the most points morally, ethically, practically, and legally?

I find guidance in a quote from a great President, Franklin Delano Roosevelt. Back in 1940 President Roosevelt expressed his view of the role that administrative agencies should play in government. He said, "A common sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decision with an eye that looks forward to results rather than backwards to precedent and to the leading case. Substantial justice remains a higher aim for our civilization than technical legalism."

In this case I believe the legal record, reason and justice all warrant our waiving the 25 percent benchmark on behalf of Fox today. It is only because I continue to believe that this result will ultimately be reached, and reached quickly, that I will not dissent to the part of the item that defers decision on this issue to another day. Nevertheless, I must emphasize my view that it is past time to conclude this proceeding and refocus our attention on matters in which the merits are not as clear-cut as they are here. It is time to free Fox from costly litigation and unsubstantiated accusations and grant it the freedom and assurance to again devote all its resources to providing the public a strong, competitive, diverse, American fourth network.