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Metropolitan Council of NAACP Branches v. FCC: Isolated Instance or De Facto Elimination of the Cross-Ownership Ban

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I. INTRODUCTION

In 1975, the Federal Communications Commission (FCC or the Commission) promulgated its Second Report and Order\(^1\) concluding a seven year administrative process in which it considered cross-ownership of media outlets.\(^2\) This regulation prohibits the owner of a television station from owning or purchasing in the future a daily newspaper with distribution covering the same market area.\(^3\) The Second Report and Order further provides that, "if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of any broadcast stations that it owned in that market within one year or by the time of its next renewal date, whichever is longer."\(^4\) The regulation also required divestiture of media outlets in some existing cases.\(^5\)

Under the Broadcasting Act of 1934, the Commission is given authority to act so long as it finds that its actions serve the "

\(^1\) 50 F.C.C.2d 1046 (1975) (codified in 47 C.F.R. §§ 73.35, 73.240, 73.636 (1976)).


\(^3\) 47 C.F.R. § 73.3555(d) (1994). The regulation provides, in pertinent part:

\(\text{(d) Daily newspaper cross-ownership rule. No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in: . . . (3) The Grade A contour of a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.}

Id. The section further provides: "Note 6: For the purpose of this section a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication. A college newspaper is not considered as being generally circulated." 47 C.F.R. § 73.3555 n.6 (1994).

\(^4\) Hoffman, supra note 2, at 335 (citing Second Report and Order, 50 F.C.C.2d at 1047).

\(^5\) Id. With respect to 16 "egregious cases" where an entire local media market was monopolized by an existing combination, the Second Report and Order required divestiture. Id. (citing Second Report and Order, 50 F.C.C.2d at 1080).
interest, convenience, and necessity." While the FCC is an administrative agency of the executive branch, historically, Congress has attempted to exert oversight prerogatives over the Commission. In the view of congressional oversight committees, the idea that the FCC is an "arm of Congress" has long existed and still persists. Since the 1980s, when the FCC sought broad deregulation of communications, the pro-regulation congressional oversight committees have vehemently fought to make the FCC enforce its own regulations and heed congressional wishes.

The Commission rationalized the adoption of the cross-ownership ban as serving the public interest, concluding that the ban furthered the goal of upholding First Amendment rights by "pro-

6. Broadcasting Act of 1934, 47 U.S.C. § 301 (1988). This statutory mandate is subjective; scholars in the telecommunications field have criticized it as "ill defined to the point of being meaningless." Neal Devins, Congress, the FCC, and the Search for the Public Trustee, 56 LAW & CONTEMP. PROBS. 145, 147 (Autumn 1993). Professor Devins further states, "[n]early sixty years old, this open-ended delegation governs virtually all FCC operations." Id. The statute also requires the FCC to find that the granting of a broadcast license would serve the "public interest, convenience, and necessity." Hoffman, supra note 2, at 333 n.2 (citing 47 U.S.C. § 309(a) (1982)).

7. Devins, supra note 6, at 147. Congress acted on the belief that "[r]egular and systematic oversight will increase Commission accountability for the implementation of congressional policy." Id. at 148 (quoting H.R. CONF. REP. No. 208, 97th Cong., 1st Sess. 899 (1981)). Based on this belief, the House Telecommunications Subcommittee has more than doubled the size of its staff since 1980 to ensure effective oversight. Id. (citing Micromanagement of the FCC: Here to Stay, BROADCASTING, Dec. 26, 1988, at 56, 57).

8. Devins, supra note 6, at 148-49. Former Speaker of the House of Representatives Sam Rayburn once said to President John F. Kennedy's FCC Chair Newton Minow: "Just remember one thing, son. Your agency is an arm of the Congress; you belong to us. Remember that and you'll be alright." Id. (quoting ERWIN G. KRASNOW, ET AL., THE POLITICS OF BROADCAST REGULATION 89 (3d ed. 1982)). More recently, Senator Robert Packwood said to FCC Chair Mark Fowler: "[Y]ou are a creature of Congress and you attempt to administer . . . [the] laws in accordance with what you think Congress has intended." Id. at 149 (quoting Joint Hearings, The Universal Telephone Service Preservation Act of 1983, 98th Cong., 1st Sess. 67 (1983)).

9. Id. at 145-46. The Commission used whatever means it could to achieve its deregulatory goals. Id. at 146. Professor Devins expanded on this matter, stating: When political circumstances allowed the FCC to invoke the Constitution to support its political agenda, the FCC paid homage to the supreme law of the land. When the political costs of advancing its constitutional interpretation were high, the FCC did not abide by its constitutional scrupules . . . . Congress . . . labelled [the FCC] a political malfeasant hiding behind irrelevant constitutional subterfuge.

Id.

10. Hoffman, supra note 2, at 336. The Commission found that the ban would promote diversity of viewpoints and economic competition. Id. (citing Second Report and Order, 50 F.C.C.2d 1046, 1048 (1975)). In the Second Report and Order, the Commission defined public interest as including "the widest possible dissemination of information from diverse and antagonistic sources." Id. at 336
The Supreme Court upheld the validity of this ban in *FCC v. National Citizens Committee for Broadcasting.* Despite judicial approval of the ban, the FCC has allowed parties to contravene the ban through the use of temporary waivers. Faced with such waivers, Congress has clearly expressed its desire that the ban be strictly enforced.

The continued viability, and even necessity, of the cross-ownership ban has been challenged, particularly in large media markets. Significant development of a wide range of viewing and listening options results in easier entry into new electronic media markets. Many believe that this economic and technical progress...
has rendered the policy concerns which originally justified the ban, especially those regarding economic and viewpoint monopolization, obsolete.\textsuperscript{17}

In 1993, the FCC granted a permanent waiver of the cross-ownership ban to Rupert Murdoch.\textsuperscript{18} Murdoch requested this permanent waiver before he agreed to purchase the \textit{New York Post} (\textit{Post}).\textsuperscript{19} The United States Court of Appeals for the District of Columbia Circuit affirmed the Commission’s grant of this permanent waiver in \textit{Metropolitan Council of NAACP Branches v. FCC}.\textsuperscript{20}

\textit{Metropolitan Council of NAACP Branches} focuses on the continuing struggle between the Congress, the FCC and the media over the FCC’s cross-ownership ban. This note discusses the evolution of the cross-ownership rule and the D.C. Circuit’s decision in \textit{Metropolitan Council of NAACP Branches}. Section II establishes the factual background of the dispute in \textit{Metropolitan Council of NAACP Branches}. Section III introduces the historical development of the cross-ownership rule and the legal framework surrounding \textit{Metropolitan Council of NAACP Branches}. Section IV analyzes the D.C. Circuit’s reasoning in the \textit{Metropolitan Council of NAACP Branches} opinion. Section V examines the court’s affirmation of the permanent waiver in light of precedent, congressional interests and modern circumstances. Section VI discusses the impact of \textit{Metropolitan Council of NAACP Branches} on the continued existence of the cross-ownership rule.

\section*{II. Facts}

Rupert Murdoch is the principal owner of Fox Television Stations, Inc. (Fox).\textsuperscript{21} In 1986 he acquired WNYW-TV, a New York City television station.\textsuperscript{22} At the time of this acquisition, Murdoch also owned the \textit{New York Post}.\textsuperscript{23} Owning both a television station and a newspaper in New York City placed Murdoch in violation of

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\textit{Analysis of Media Outlets By Market}, app. II (1987) (prepared for Research and Planning Department, National Association of Broadcasters).
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\textsuperscript{17} \textit{Id}. at 445. Today, nearly every media market "is filled with a great variety of video images and radio voices, all competing for the public eye and ear." \textit{Id}.  

\textsuperscript{18} \textit{Metropolitan Council of NAACP Branches v. FCC}, 46 F.3d 1154, 1157-59 (D.C. Cir. 1995). Murdoch is the owner of Fox Television Stations, Inc. \textit{Id}. at 1157.  

\textsuperscript{19} \textit{Id}. The \textit{Post} was bankrupt at the time of Murdoch’s agreement to purchase it. \textit{Id}.  

\textsuperscript{20} \textit{Id}. at 1166.  

\textsuperscript{21} \textit{Id}. at 1157.  

\textsuperscript{22} \textit{Id}.  

\textsuperscript{23} \textit{Metropolitan Council of NAACP Branches}, 46 F.3d at 1157.
the cross-ownership ban and the Commission gave him a two year period to divest his interest in the *Post*.24 Before the two years elapsed, Murdoch sold the newspaper.25 After the sale, the newspaper and its new owner struggled to remain solvent.26 The newspaper’s eventual bankruptcy caused readership and advertising sales to drop and resulted in serious operational difficulties.27 As a result of these problems, government officials asked Murdoch and Fox to repurchase the newspaper.28 Despite these requests, Fox was in competition with Champion Holding Company in the bidding for the *Post*.29 Ultimately, every bid except Murdoch’s was rejected either by the *Post* Company or by the bankruptcy court as “unrealistic” or “insufficient.”30

In March of 1993, Fox executed a management agreement for control of the *Post* which the bankruptcy court approved.31 This agreement was conditioned upon, among other things, Murdoch’s ability to obtain a permanent waiver of the FCC’s cross-ownership

24. *Id.* (citing 47 C.F.R. § 73.3555(d) (1994)).
25. *Id.* Real estate developer Peter Kalikow purchased the *Post* in 1988. *Id.*
26. *Id.* Kalikow declared personal bankruptcy in 1991, and despite his own efforts and the efforts of his bankruptcy creditors committee, negotiations to sell the *Post* to various groups failed through 1992. *Id.* In 1993, real estate developer Abraham Hirschfeld agreed to purchase the newspaper, and the search for alternative buyers ceased. *Id.* After Hirschfeld was given operational control, his managerial decisions lead to disputes with the paper’s editorial staff. *Id.* These arguments prevented Hirschfeld from completing the purchase of the newspaper. *Id.* At this point Kalikow initiated bankruptcy proceedings for the *Post*’s parent company, the New York Post Co. *Id.*
27. *Id.* Financial distress caused the newspaper to struggle to obtain production supplies, to provide employee benefits and to pay taxes. *Id.*
28. *Metropolitan Council of NAACP Branches*, 46 F.3d at 1157. Mario Cuomo, governor of New York, was among the officials requesting that Murdoch buy the *Post*. *Id.*
29. *Id.* Champion Holding Company (Champion), tried to tender a check for $1,000,000 to the bankruptcy court. *Id.* The court refused to accept the offer because it was concerned that it had not received offers from all of the bidders interested in purchasing the *Post*. *Id.* Champion continued its efforts to buy the paper by entering into a memorandum of understanding with the Vice President of the New York Post Company to purchase the *Post*’s assets for $7,400,000. *Id.* The agreement was to be finalized after approval by the *Post*’s committee of unsecured creditors and upon evidence that the Vice President had authorization to execute the memorandum on behalf of the *Post*. *Id.* The creditor’s committee rejected the offer on the grounds that the purchase price was insufficient, that Champion relied upon unrealistic union concessions and that Champion lacked sufficient working capital. *Id.*
30. *Id.* When the committee notified Champion that it was rejecting its bid, Champion expressed continued interest. *Id.* However, three months after the bankruptcy court approved Murdoch’s offer, Champion withdrew its offer. *Id.*
31. *Id.* Under the terms of this agreement, Murdoch was to assume operational control of the *Post*. *Id.*
The agreement provided that if the conditions were not met, the agreement would terminate on June 1, 1993. The agreement was also conditioned upon negotiations of new labor agreements with the labor unions representing the Post’s workforce. First, Fox argued that no other viable purchaser had demonstrated a willingness to undertake the financial burden of revitalizing the Post. Second, Fox claimed that the application of the cross-ownership ban in this case would defeat the ban’s underlying policy of promoting diversity by resulting in the termination of a “competitive voice.”

The Metropolitan Council of NAACP Branches, Champion and various individuals appearing as commenters (appellants) opposed Murdoch’s/Fox’s request for a permanent waiver. Appellants alleged that the FCC could not grant a permanent waiver to the cross-ownership rule because Congress had provided that appropriated funds could not be used to repeal or re-examine the rules and practices established to administer the cross-ownership rule. Appellants sought hearings regarding alleged misrepresentations by Fox as to the supposed impossibility of selling the paper. Appellants also noted that preserving the Post would not necessarily benefit diversity interests. Appellants sought to elimi-

32. Id. The agreement was also conditioned upon negotiations of new labor agreements with the labor unions representing the Post’s workforce. Id.

33. Metropolitan Council of NAACP Branches, 46 F.3d at 1157. This agreement also provided that Murdoch retained an option to extend the agreement for an additional 30 days in the event Fox had not yet obtained a waiver from the FCC. Id.

34. Id.

35. Id. at 1157-58. Collaterally, Fox argued that no bidder had demonstrated the managerial or editorial skills requisite for operation of a newspaper in New York’s competitive news environment. Id. at 1158.

36. Id. Fox argued that because the cross-ownership ban sought to further diversity of viewpoints, denial of the waiver request here would result in the elimination of the Post, a competitive member of New York’s media market, thereby actually resulting in a less diverse market. Id.

37. Id.


39. Id. The appellants argued that Murdoch was not the only viable purchaser and outlined Champion’s offer to buy the paper. Id.

40. Id. Commenters, appearing in the appeal as intervenors, alleged that the Post frequently attacked the African-American community. Id. These opponents of the waiver noted that if the paper went out of business, minority owned newspapers would potentially have greater access to the market’s advertising funds. Id.
nate Murdoch as a bidder so that minority businesspersons could purchase the Post.41

The FCC expedited Fox's request,42 and in a declaratory ruling adopted June 29, 1993, granted the permanent waiver.43 The grant of the waiver was premised on the finding that Murdoch's eligibility to buy the Post best served the public interest by allowing the bankruptcy court to consider all of the eligible bidders.44 In its ruling, the FCC discussed the nature of, and the reasoning behind, the cross-ownership ban.45 The Commission found that a denial of Fox's request would defeat the ban's purposes.46

41. Id. The commenters saw the demise of the Post as a means of opening new opportunities for minority-owned papers. Id.

42. Id. The Commission commented on the dire financial need of the newspaper, calling the circumstances “unique,” and it found that as such, the conditions called for the Commission’s “immediate attention.” Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. 5341, 5343-44 (1993)). Further, the Commission found that quick resolution would minimize conflict with bankruptcy law, which has the objectives of equality of distribution among creditors, a fresh start for debtors and efficient administration of cases. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5343-44).

43. Metropolitan Council of NAACP Branches, 46 F.3d at 1158 (citing Fox Television Stations, Inc., 8 F.C.C.R at 5341). The permanent waiver was granted by a two-to-one vote of the Commissioners. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5341). The Commission stated that waivers to this ban were granted in four situations where application of the ban would be unnecessarily harsh:

(1) where there is an inability to dispose of an interest to conform to the rules;
(2) where the only sale possible is at an artificially depressed price;
(3) where separate ownership and operation of the newspaper and station cannot be supported in the locality; and
(4) where, for whatever reason, the purposes of the rule would be disserved by divestiture.

Id. (quoting Fox Television Stations, Inc., 8 F.C.C.R. at 5348 (footnote omitted)).

44. Id. at 1158 (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5344). While not calling Fox the only viable bidder, the ruling stated that excluding Fox as a potential buyer might “ultimately disserve the underlying diversity purposes of the cross-ownership rule and would not accord the proper deference to the policies and objectives of bankruptcy law.” Id. (quoting Fox Television Stations, Inc., 8 F.C.C.R. at 5344).

45. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5347-50). The FCC stated that the ban arose from two fundamental principles. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5347). The first and most important principle was the need to promote diverse viewpoints. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5347). The second principle offered by the FCC was the prevention of undue concentration of economic power. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5347).

46. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5348). The ruling stated that Fox's request satisfied the fourth criterion for waiver, "where for whatever reason the purposes of the rule would be disserved by divestiture," and thus the Commission concluded that a permanent waiver was appropriate. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5349). For the list of criteria for waiver of the cross-ownership rule, see supra note 43.
The Commission ruled that Murdoch was uniquely suited to meet the needs of the failing Post. Further, the FCC stated that the size and nature of the New York media market alleviated its concern about an undue concentration of power over the dissemination of information in this case. The appellants called for a more probing factual inquiry regarding the circumstances underlying the waiver request. The FCC declined this request and ruled that the weight of evidence did not create a substantial and material question of fact justifying further review.

On September 15, 1993, the bankruptcy court authorized Murdoch's purchase of the Post. The court found Fox was the only realistic bidder. The court concluded that without this purchase by Murdoch, continued losses by the paper would likely lead to its liquidation. On December 17, 1993, the FCC denied the appel-

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47. Metropolitan Council of NAACP Branches, 46 F.3d at 1158. The FCC noted that the Post required a substantial capital outlay and a purchaser with newspaper expertise. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5349-50). The Commission further noted that a 16 month search had failed to produce a "suitable" buyer since the paper had been put into bankruptcy. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5349-50). The FCC stated that evidence existed to show that ownership by Murdoch could be pivotal to the paper's viability. Id.

48. Id. at 1158-59 (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5351-52). The FCC reasoned that in light of the wide spectrum of broadcast stations and newspapers in New York, the possibility that Murdoch would amass an inordinate amount of control in the marketplace was small and that preservation of the Post outweighed any cost to diversity due to the waiver. Id.

49. Id. at 1159. The Caucus for Media Diversity alleged that Fox had made material misrepresentations of fact in its request for the waiver by demanding that the Commission rule by June 1, 1993, and by claiming that it was the only viable bidder. Id.

50. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R at 5355). The Commission found that by setting an imperative time limit Fox may have been misleading, but its behavior did not materially distort the facts. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R at 5356). The Commission also found that Fox's statements regarding other purchasers merely stated Fox's opinion that no other viable purchasers existed, and that Fox was unaware of Champion's continued interest when it filed its waiver request. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. at 5356-57).

51. Id. at 1159 (citing In re New York Post Co., No. 93-B-41306 (Bankr. S.D.N.Y 1993)).

52. Metropolitan Council of NAACP Branches, 46 F.3d at 1159 (citing In re New York Post Co., No. 93-B-41306 (Bankr. S.D.N.Y 1993)). The bankruptcy court determined that other parties had reasonable opportunities to make competitive bids but failed to do so. Id. (citing In re New York Post Co., No. 93-B-41306 (Bankr. S.D.N.Y 1993)).

53. Id. (citing In re New York Post Co., No. 93-B-41306 (Bankr. S.D.N.Y 1993)).
lants’ petition for reconsideration based on Fox’s alleged misrepresentation.54

III. BACKGROUND

The FCC grants initial licenses for television and radio broadcast stations, or renewal of those licenses, only if it finds that the public interest, convenience and necessity will be served.55 Through its early licensing policies, the Commission advanced the theory that diversification of mass media ownership served the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.56 Beyond diversification, however, the Commission considered many other factors relevant to the public interest.57 The paramount policy of the Commission was to avoid undue disruption of existing service.58

54. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. 8744 (1993)). The Commission ruled that the issue of misrepresentation was fully considered and rejected in the declaratory ruling. Id. (citing Fox Television Stations, Inc., 8 F.C.C.R. 8744 (1993)).

55. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 780 (1978) (citing 47 U.S.C. §§ 307(a), (d), 308(a), 309(a), (d) (1994)). These licenses are granted pursuant to the regulatory scheme established by the Radio Act of 1927 and the Communications Act of 1934. Id. (citing Radio Act of 1927, 44 Stat. 1162 (1927); Communications Act of 1934, 47 U.S.C. § 301 (1934)).

56. Id. (citing Multiple Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476, 1476-77 (1964)). Since the 1940s the Commission has implemented an increasingly more stringent line of regulations on broadcast station ownership. Id. The Commission has prohibited ownership of more than one station in the same broadcast service, limited the total number of stations in each service that a person or entity could control or own and prohibited common ownership of a television and radio station in the same market. Id. (citing Multiple Ownership of Standard Broadcast Stations (AM Radio), 8 Fed. Reg. 16065 (1943); Rules and Regulations Governing Standard and High Frequency Broadcast Stations (FM Radio), § 3.228(a), 5 Fed. Reg. 2382, 2384 (1940); Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288 (1953); Multiple Ownership of Standard FM and Television Broadcast Stations, 22 F.C.C.2d 306 (1970), as modified, 28 F.C.C.2d 662 (1971)).

57. Id. at 782. The Commission maintained another, sometimes conflicting, goal of ensuring the “best practicable service to the public.” Id. (quoting Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965)). The Commission attempted to achieve this goal weighing various factors, other than diversification of ownership, when making licensing decisions. Id. These factors include the anticipated contribution of the owner to station operations, proposed program service and the past broadcast record of the applicant. Id. (citing Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d at 395-400).

58. Id. As a result of this policy consideration, newspaper owners in a number of instances obtained broadcast licenses for stations serving the same communities as their newspapers, and the FCC frequently renewed such licenses, finding that continuation of service offered by a common owner would best serve the public interest. Id. at 783.
Before formulating any formal policy on cross-ownership, the Commission denied the owner of a newspaper renewal of a broadcast station license, and the newspaper appealed this decision to the D.C. Circuit.\textsuperscript{59} \textit{Greater Boston Television Corp. v. FCC} established that the Commission could select the cross-ownership policies it deemed to be in the public interest.\textsuperscript{60} Acknowledging that an agency's view of what is in the public interest may change either with or without a change in circumstances, the D.C. Circuit found that when an agency changes its course it must supply a reasoned analysis indicating that prior policies and standards are being intentionally and deliberately changed, and are not casually ignored.\textsuperscript{61} The court found that the Commission did not exceed its powers by attempting to avoid, rather than condone, a concentration of control of the sources of news and opinions.\textsuperscript{62}

\textsuperscript{59} Greater Boston Television Corp. v. FCC, 444 F.2d 841, 844 (D.C. Cir. 1970), \textit{cert. denied}, 403 U.S. 923 (1971). In 1957, the FCC concluded a three year selection process for a licensee to operate a television station in Boston by granting the license to WHDH, Inc., a wholly owned subsidiary of the corporate publisher of the \textit{Boston Herald-Traveler}. \textit{Id.} (citing WHDH, Inc., 22 F.C.C. 767 (1957)). Addressing concerns of improper ex parte contacts with the Commission's chairman, the Commission allowed WHDH, Inc. to maintain temporary authorization to operate the station, but it reconsidered all of the applicants for the license in a new proceeding. \textit{Id.} at 844-45 (citing WHDH, Inc., 29 F.C.C. 204 (1960)). Following these proceedings, a hearing examiner challenged the need for diversification of ownership of the television stations and newspapers in a single market. \textit{Id.} at 846. The license was granted to another applicant instead of WHDH, Inc., with the FCC emphasizing the need to diversify the market. \textit{Id.} at 848.

\textsuperscript{60} \textit{Id.} at 851. The court noted that its supervisory function was to assure that the agency had given reasoned consideration to all the material facts and issues. \textit{Id.} (citing \textit{Permian Basin Area Rate Cases}, 390 U.S. 747, 792 (1968); \textit{Scenic Hudson Preservation Conference v. F.P.C.}, 354 F.2d 608 (2d Cir. 1965), \textit{cert. denied}, 384 U.S. 941 (1966); \textit{City of Pittsburgh v. F.P.C.}, 237 F.2d 741 (D.C. Cir. 1956). The court's responsibilities do not merely involve review of procedure or legislative mandate, but require inquiry into whether "the agency has . . . really taken a 'hard look' at the salient problems." \textit{Id.} (citing \textit{Pikes Peak Broadcasting Co. v. FCC}, 422 F.2d 671 (D.C. Cir.), \textit{cert. denied}, 395 U.S. 979 (1969); \textit{WAIT Radio v. FCC}, 418 F.2d 1153 (D.C. Cir. 1969)).

\textsuperscript{61} \textit{Id.} at 852 (citing \textit{City of Chicago v. F.P.C.}, 385 F.2d 629, 637 (D.C. Cir. 1967), \textit{cert. denied}, 390 U.S. 945 (1968); \textit{New Castle County Airport Comm'n v. C.A.B.}, 371 F.2d 739, 735 (D.C. Cir. 1966), \textit{cert. denied}, 387 U.S. 930 (1967); \textit{Pinellas Broadcasting Co. v. F.C.C.}, 230 F.2d 204, 206 (D.C. Cir.), \textit{cert. denied}, 350 U.S. 1007 (1956)). The court stated that "if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." \textit{Id.} (citing \textit{Marine Space Enclosures, Inc. v. F.M.C.}, 420 F.2d 577, 585 (D.C. Cir. 1969); \textit{WAIT Radio v. FCC}, 418 F.2d 1153, 1157 (D.C. Cir. 1969)).

\textsuperscript{62} \textit{Id.} at 859 (citing \textit{McClatchy Broadcasting Co. v. FCC}, 239 F.2d 15 (D.C. Cir. 1956), \textit{cert. denied}, 353 U.S. 918 (1957); \textit{Scripps-Howard Radio, Inc. v. FCC}, 189 F.2d 677 (D.C. Cir.), \textit{cert. denied}, 342 U.S. 830 (1951)). The court stated that while the course adopted by the Commission was novel, it was not arbitrary and unreasonable. \textit{Id.} Further, the court found that although the need for diversity and the
In 1968, the Commission began the rulemaking process to consider a restrictive policy toward newspaper ownership of radio and television broadcast stations that culminated in the 1975 Second Report and Order.\(^6^3\) The Commission determined such a rule would be in the public interest, noting that "public interest encompasses many factors including 'the widest possible dissemination of information from diverse and antagonistic sources.'"\(^6^4\) The Commission justified this policy by stating that increases in diversification of ownership would enhance diversity of viewpoints.\(^6^5\) However, the Commission expressly retained the power to provide waivers of the ban in exceptional circumstances.\(^6^6\)

In *FCC v. National Citizens Committee for Broadcasting*, the Supreme Court addressed the validity of the FCC's cross-ownership regulations.\(^6^7\) Affirming the judgment of the D.C. Circuit, the danger of concentration was not as great in Boston as in smaller markets, it was a factor to which the FCC could give dominant weight. *Id.* at 859-60.

63. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 783-84 (1978). The Commission concluded that it had statutory authority to promulgate the cross-ownership ban under the Communications Act. *Id.* at 784 (citing Second Report and Order, 50 F.C.C.2d 1046, 1048 (1975) (citing 47 U.S.C. §§ 152(a), 154(i), 154(j), 301, 303, 309(a) (1994))). The Commission further determined that the regulation was valid under the First and Fifth Amendments of the Constitution. *Id.* at 784-85 (citing Second Report and Order, 50 F.C.C.2d at 1048).

64. *Id.* at 785 (citing Second Report and Order, 50 F.C.C.2d at 1048 (quoting Associated Press v. United States, 326 U.S. 1 (1940))). The Commission grounded its ban on ownership of co-located newspaper-broadcast combinations primarily upon First Amendment considerations. *Id.* (citing Second Report and Order, 50 F.C.C.2d at 1049).

65. *Id.* at 786 (citing Second Report and Order, 50 F.C.C.2d at 1076). The Commission found that in the absence of persuasive countervailing considerations, "even a small gain in diversity" was "worth pursuing." *Id.* (citing Second Report and Order, 50 F.C.C.2d at 1080 n.30).

66. *Id.* n.9 (citing Second Report and Order, 50 F.C.C.2d at 1076 n.24, 1077). The FCC established three specific instances which would validate a waiver, and one catch-all provision. *Health and Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1042 (D.C. Cir. 1986). The Commission policy stated:

> It is not our intention that the [cross-ownership] rules should work a forfeiture . . . . For this reason [1] inability to sell the station would be a basis for waiver . . . . [2] We would take a similar view if the only sale possible would have to be at an artificially depressed price. [3] Likewise, if it could be shown that separate ownership and operation of the newspaper and station cannot be supported in the locality, waiver might well be appropriate . . . . [4] Finally, if it could be shown for whatever reason that the purposes of the rule . . . . would be better served by continuation of the current ownership pattern, then waiver could be warranted.

*Id.* (citing Second Report and Order, 50 F.C.C.2d at 1085 (footnotes omitted)).

67. *National Citizens Comm. for Broadcasting*, 436 U.S. at 779. Petitioners in this case, including the National Citizens Committee for Broadcasting (NCCB), the National Association of Broadcasters (NAB), the American Newspaper Publishers Association (ANPA) and several broadcast licensees subject to the divestiture re-
Court upheld the FCC's prospective ban on cross-ownership. The Court also agreed that the Commission acted within its statutory authority in concluding that the maximum benefit to the public interest would follow from allocation of broadcast licenses to promote diversification of the mass media as a whole. The Court found that the regulations were based on permissible public interest goals and were not unreasonable means to achieve such goals.

According to the Court, the Commission's decision to give controlling weight to the goal of diversification in shaping its rule was a reasonable administrative response to changed circumstances in the broadcasting industry. Finally, the Court rejected the appellants' argument that the Commission's regulations violated the First Amendment rights of newspaper owners.

requirement, sought review of the constitutionality of the cross-ownership ban. Id. at 789.

68. Id. at 792. The Court also reversed in part the court of appeals' decision vacating the rule's limited divestiture requirement. Id.

69. Id. at 795. The Court noted it was well established that the general rule-making authority granted to the Commission under the Communications Act supplied a statutory basis for the promulgation of regulations codifying the Commission's view of the public interest licensing standard, so long as that view was based on consideration of permissible factors and was otherwise reasonable. Id. at 793 (citing United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); National Broadcasting Co. v. United States, 319 U.S. 190 (1943)).

70. Id. at 796. The Court ruled that the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints. Id. The Court further held that the FCC could reasonably find that achieving greater diversity of viewpoints would be in the public interest. Id.

71. Id. at 797 (citing Second Report and Order, 50 F.C.C.2d 1046, 1074-75 (1975); FCC v. Pottsville Broadcasting Co. 309 U.S. 134, 137-38 (1940)). The "changed circumstance" was the substantial decrease of channels open for new licensing. Id. The Court also held that the Commission clearly did not take an irrational view of the public interest in banning cross ownership. Id.

72. National Citizens Comm. for Broadcasting, 436 U.S. at 798. Appellants argued that it was inconsistent with the First Amendment to promote diversification by preventing newspaper owners from owning broadcast stations. Id. They urged that the "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others." Id. (quoting Buckley v. Valeo, 426 U.S. 1, 50 n.55 (1976) (quoting Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973))). The Court found that appellants' argument ignored the fundamental proposition that there was no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Id. (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. at 367, 388-89 (1969)). The Court reasoned that the physical scarcity of broadcast frequencies justified regulation of such frequencies. Id. (citing Red Lion Broadcasting, 395 U.S. at 387-88; National Broadcasting Co. v. United States, 319 U.S. 190, 210-18 (1943); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 282 (1933)). Recognizing the need for such regulation, the Court saw nothing in the First Amendment to prevent the Commission from allocating licenses to promote the public interest in diversification of the mass media. Id. Further, the Court noted that requiring those wishing to obtain a broadcast license
In 1986, the D.C. Circuit examined the validity of the grant of a waiver to the cross-ownership ban. In *Health and Medicine Policy Research Group v. FCC*, a consortium of individuals and public interest groups challenged the FCC's grant of a waiver of the cross-ownership ban stemming from the breakup of the former media conglomerate known as Metromedia Radio and Television, Inc. The Commission granted a two year waiver of the rule, finding such a waiver consistent with the public interest. The court noted that when the Commission established the cross-ownership ban, it expressly contemplated waivers for newly created combinations brought about through a television licensee purchasing a daily newspaper. The court also remarked that because the factual determinations made by the Commission regarding the necessity of

to demonstrate that such licensing would serve the public interest did not restrict the speech of those denied licenses; rather it preserved the interests of the people as a whole in free speech. *Id.* at 800 (citing *Red Lion Broadcasting*, 395 U.S. at 390). The Court concluded that the denial of an application for a license because the public interest required such denial did not amount to a denial of free speech. *Id.* (citing *Red Lion Broadcasting*, 395 U.S. at 389 (quoting *National Broadcasting*, 319 U.S. at 227)).


74. *Id.* at 1040. In 1985, News America Television, Inc., which changed its name during the proceeding to Fox Television Stations, Inc., purchased a number of Metromedia's television stations in major cities. *Id.* Rupert Murdoch, the owner of Fox, already owned newspapers in two cities where Fox sought to purchase stations. *Id.* Thus when Fox applied to obtain a transfer of Metromedia's broadcasting licenses, it also requested a waiver of the FCC's cross-ownership rule. *Id.* The appellants in this case argued that granting such waivers would reduce the diversity of broadcast voices in the affected areas. *Id.* Fox based its application for the waivers on the contention that a waiver would avoid a "distress sale" of two of its newspapers, a recognized basis for such waivers. *Id.* For the list of recognized reasons for waivers of the cross-ownership rules, see *supra* note 66.

75. *Health and Medicine Policy Research Group*, 807 F.2d at 1041 (citing *In re Applications of Metromedia Radio & Television, Inc.*, 59 R.R.2d (P & F) 1196 (1985)). The Commission found that the existence of numerous media outlets serving the markets to which the waiver was applicable supported the conclusion that no undue concentration of the media would result from a limited waiver. *Id.* (citing *Application of Metromedia, 59 R.R.2d at 1205*). The Commission also recognized that market factors associated with sales of daily newspapers are different than those affecting broadcast properties and, therefore, the two year waiver was appropriate under the facts of this case. *Id.* (citing *Application of Metromedia, 59 R.R.2d at 1205*). The Commission believed that such a waiver period represented a reasonable balance between the policies expressed in the cross-ownership rule and the belief that, in divestiture cases, reasonable accommodations can be made to avoid the risk of distress sales. *Id.* (citing *In re Application of Metromedia, 59 R.R.2d at 1205*).

76. *Id.* (citing *Second Report and Order, 50 F.C.C.2d 1046, 1076 n.25 (1975)*). The court cited prior authorizations of cross-Ownership of television-radio and television-newspaper combinations. *Id.* (citing *Gulf Broadcasting Co., 100 F.C.C.2d 238 (1984); Golden West Assoc., LP, 59 R.R.2d 125 (1985)*). The court also relied upon the established proposition that "[t]he possible waiver of viola-
waiver were primarily of a judgmental or predictive nature, com-
plete factual support in the record for the Commission’s judgment
was neither possible nor required.\footnote{Id. at 1043 (citing FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 813 (1974)).}
Finding that review of the
Commission’s decision was limited by an “arbitrary and capricious”
standard,\footnote{Id. (citing Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982)).} the court stated that under circumstances like those at
issue, the Commission’s judgment regarding how to best serve the
public interest required substantial judicial deference.\footnote{Id. (citing FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981)).} The court concluded that although the evidence presented by Fox in support of its distress-sale claim was scant, the evidence supported the FCC’s
determination that waiver was appropriate.\footnote{Health and Medicine Policy Research Group, 807 F.2d at 1044. The court
called Fox’s showing “nothing to crow about.” Id. Fox’s “Public Interest State-
tment” discussed only in general terms the difficulty of selling newspapers, particu-
larly in markets with a dominant paper. Id. The statement also claimed that
denial of the waiver could threaten the continued viability of the newspapers,
which would counterproductively lead to a reduction in diversity. Id. Factors in
Fox’s favor were the comparatively lenient evidentiary standard in distress sale
waiver request cases and the high degree of judicial deference to the Commission
when it undertakes this sort of function. Id. at 1044-45.}

At this point, it is important to note that the Commission
granted not only temporary waivers to the cross-ownership ban, but
also granted one permanent waiver in Field Communications Corp.\footnote{65 F.C.C.2d 959 (1977). Field Communications Corporation (Field) ap-
plicated to the FCC for the assignment of licenses of five independent UHF television
stations. Id. Field already possessed a 22.5% ownership interest in these stations,
and sought to purchase the remaining 77.5% interest. Id. Field’s parent corpora-
tion was the publisher of daily newspapers in two of the stations’ markets, and thus
without waiver of the cross-ownership ban, the desired assignment of the licenses
would have placed Field in violation of FCC rules. Id.}

In Field Communications Corp., the FCC first highlighted the source
of its authority to grant waivers under certain circumstances.\footnote{Jeffrey S. Moorad Sports Law Journal, Vol. 3, Iss. 2 [1996], Art. 10
http://digitalcommons.law.villanova.edu/mslj/vol3/iss2/10}
Commission further stated that while it had no intent to "relitigate issues considered and rejected when the cross-ownership rule was adopted . . . parties could bring . . . attention [to] whatever special circumstances they thought had a bearing on the appropriateness of granting such a waiver." 84 The Commission found that the cross-ownership rules were not applicable to existing ownership patterns such as the one at issue here, and that granting the applications for permanent waiver served the public interest. 85 However, this ruling seemed limited by the Commission’s acknowledgment that this grant was made because of the highly unusual facts of the case. 86

At the end of 1987, Congress passed Public Law 100-202 which prescribed that no federal funds could be spent to re-examine or repeal the FCC’s cross-ownership ban or to extend the time limitation for any temporary waivers to the rule already in existence. 87 At the time of the passage of this resolution, the sole holder of any temporary waiver of the sort specified in the limitation was News America Publishing, Inc. (now known as Fox). 88

84. Id. In support of its application for waiver, Field submitted that "(1) encouragement of UHF television growth is the type of exigency . . . referred [to] in providing for waivers; and (2) since there is no 'new entrant' in the market nor a 'new ownership pattern,' the present cross-ownership pattern was not intended [to bar such reassignment]." Id.

85. Id.

86. See News America Publishing, Inc. v. FCC, 844 F.2d 800, 803 (D.C. Cir. 1988) (citing Brief for the FCC at 28 n.10). The D.C. Circuit interpreted the decision in Field Communications Corp. as having unique facts in that it concerned a reacquisition that seemed to be little more than a pro forma transfer to a licensee already approved for cross-ownership, and the permanent waiver was a "virtually inevitable concomitant of the [cross-ownership ban’s] original grandfathering protection." Id. at 803 n.4 (citing Field Communications Corp., 65 F.C.C.2d at 961).

87. Id. at 802 (citing Pub. L. No. 100-202, 101 Stat. 1329 (1987)). This limitation was buried on page 34 of a 471 page resolution appropriating all federal government funds for the 1988 fiscal year. Id. More specifically, the limitation was in a 379 word paragraph entitled “Federal Communications Commission Salaries and Expenses,” between a proviso concerning VHF channel assignments to educational stations and a restriction on cellular telephone systems in rural areas. Id. The provision provides in relevant part:

[N]one of the funds appropriated by this Act or under any other Act may be used to repeal, to retroactively apply changes in, or to begin or continue a re-examination of the rules of the Federal Communications Commission with respect to the common ownership of a daily newspaper and a television station where the grade A contour of the television station encompasses the entire community in which the newspaper is published or to extend the time period of current grants of temporary waivers to achieve compliance with such rules . . .


88. Id. In November 1985 and November 1986, Fox received FCC permission for its acquisition of the licenses of WNYW-TV in New York City and WXNE-TV in Boston. Id. at 804. Because News America owned the New York Post and the Boston
challenged Public Law 100-202 under the First and Fifth Amendments of the Constitution.\textsuperscript{89}

The D.C. Circuit found that the provision dealing with extension of temporary waivers applied to only one publisher/broadcaster.\textsuperscript{90} In such circumstances, the potential for First Amendment abuses is so great that a mere invocation of Congress's "conventional power to approach a problem one step at a time" could not alter the invalidity of this provision.\textsuperscript{91} The court found the last eighteen words of the provision unconstitutional; reasoning that, regardless of whether the waiver process was constitutionally compelled, First Amendment values were implicated in the processes, thus mandating evenhanded treatment of all applicants.\textsuperscript{92}

\textit{Herald}, these acquisitions required waivers of the cross-ownership rule, which the Commission granted. \textit{Id.} In spite of the passage of the provision in question in this case, in 1988 News America applied to the FCC for an extension of these existing waivers. \textit{Id.} at 802. The FCC denied these applications, finding that the provision barred such extension. \textit{Id.}

89. \textit{Id.} at 802. In its review of News America's argument, the court only considered the last 18 words of the provision. \textit{Id.} n.1. The court found that the language forbidding re-examination of the cross-ownership rule was not ripe for review. \textit{Id.} News America claimed that although the limitation on extension of temporary waivers was general in form, it was not general in reality because it burdened only one broadcaster/publisher. \textit{Id.} at 802. The court determined that under the First and Fifth Amendments, the provision needed to be scrutinized under a test more stringent than the "minimum rationality" test usually employed for conventional economic legislation under equal protection analysis. \textit{Id.} Primarily, News America challenged the provision based on the intersection of the First Amendment's protection of free speech and the Equal Protection Clause's requirement that government afford similar treatment to similarly situated persons. \textit{Id.} at 804.

90. \textit{Id.} at 810. The court determined that the sole purpose of the Amendment was to deny Rupert Murdoch and News America an extension of the only existing temporary waiver. \textit{Id.}

91. \textit{Id.} at 815. The court emphasized that the Supreme Court in upholding the cross-ownership ban against First Amendment challenge, found that the "reasonableness" of the ban was "underscored" by the availability of waivers in situations where a station or newspaper could not survive without common ownership. \textit{Id.} (quoting FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 802 n.20 (1978)).

92. News Am. Publishing, Inc. v. FCC, 844 F.2d 800, 815 (D.C. Cir. 1988). The court ruled that "more is required than 'minimum rationality'" in order to sustain the provision. \textit{Id.} at 814. The court viewed the provision as "astonishingly underinclusive" because:

[i]n short, every publisher in the country other than Murdoch can knock on the FCC's door and seek the exercise of its discretion to secure, either by a single temporary waiver or by a waiver coupled with an extension, a period of exemption from the cross-ownership restrictions longer than that to which News America is restricted as a matter of law. \textit{Id.} Although Congress need not eliminate a problem all at once, the court determined that it must "reject as facile one-bite-at-a-time explanation for rules affecting important First Amendment values." \textit{Id.} at 815.
In a dissenting opinion in *News America Publishing, Inc.*, Judge Robinson acknowledged that over time the Commission's attitude toward the cross-ownership rule changed to the point that the Commission might even favor repeal of the rule. Judge Robinson wrote that Public Law 100-202 was merely Congress's reaction to what it perceived as the threatened erosion, if not eradication of the cross-ownership rule. Judge Robinson ultimately found that Congress's purpose in enacting the provision was to preserve the cross-ownership rule and promote First Amendment values, and that this purpose added substantial weight to the governmental interest in the legislation. Thus, Judge Robinson stated that he would have found the entire provision valid because it pursued the government's wholly legitimate purpose of protecting the cross-ownership rule from circumvention or erosion.

IV. NARRATIVE ANALYSIS

Judge Sentelle, writing for the unanimous court in *Metropolitan Council of NAACP Branches v. FCC*, affirmed the FCC's decision to

93. *Id.* at 816 (Robinson, J., dissenting). Judge Robinson quoted from the Commission's Brief, which stated:

This is not to say that, in the Commission's view, continuing the ban on newspaper/television cross-ownership for another year is necessarily good public policy. Indeed, had Congress not provided otherwise, the Commission might have concluded that the present rule against newspaper/television cross-ownership should have been reviewed to determine whether it continued to serve the public interest. *Id.* n.9 (Robinson, J., dissenting) (quoting Brief for the Appellee at 16).

94. *Id.* at 817 (Robinson, J., dissenting). Senator Hollings said, "I am trying to catch a runaway Federal Communications Commission. They are the ones who have been edging to not just another waiver but permanent repeal." *Id.* at 819 n.25 (Robinson, J., dissenting) (quoting 134 CONG. REC. S57 (daily ed. Jan. 26, 1988) (Statement of Sen. Hollings)).

95. *Id.* at 818 (Robinson, J., dissenting). The FCC's Congressional oversight subcommittee wrote, "we firmly believe that the cross-ownership rules are vitally important in protecting competition in the marketplace of ideas and that waivers to those rules should be viewed as an extraordinary, not an ordinary action." *Id.* (Robinson, J., dissenting) (quoting Letter from House of Representatives Subcomm. on Telecommunications to Mark S. Fowler, supra note 14).

96. *Id.* at 823 (Robinson, J., dissenting). Judge Robinson found that the intent of Congress was to preserve the cross-ownership rule, and that Congress determined that grant of waivers weakened or circumvented the rule. *Id.* at 820 (Robinson, J., dissenting). Therefore, Judge Robinson believed that a congressional prohibition on extensions of waivers, even if only applicable to already existing waivers, was based upon a permissible legislative purpose. *Id.* (Robinson, J., dissenting).

97. 46 F.3d 1154, 1156 (D.C. Cir. 1995). Judges Randolph and Rofers joined in this opinion. *Id.* For discussion of the facts in this case, see supra notes 21-54 and accompanying text.
grant to Fox a permanent waiver of the cross-ownership ban.\textsuperscript{98} The D.C. Circuit addressed four issues raised on appeal.\textsuperscript{99} The first issue concerned alleged misrepresentations of fact by Fox.\textsuperscript{100} Appellants alleged that there was \textit{prima facie} evidence that Fox possessed intent to deceive and that the FCC improperly failed to order a hearing on the alleged misrepresentation.\textsuperscript{101} Appellants further argued that the Commission erred in assuming the evidence had to prove intent to deceive before a hearing was required.\textsuperscript{102} Appellants urged that the FCC arbitrarily and capriciously departed from precedent by denying a hearing on the alleged misrepresentations.\textsuperscript{103} Further, appellants claimed that Fox demonstrated a pattern of misrepresentations and thus the FCC erred in not ordering further inquiry into this behavior.\textsuperscript{104}

Preliminarily, the court acknowledged that it owed substantial deference to an agency decision, and that the decision must be upheld unless an agency's action is an "arbitrary, capricious, . . . abuse of discretion, or otherwise not in accordance with law."\textsuperscript{105} The court rejected appellants' assertions that Fox had intentionally made misrepresentations and the court dismissed the contention

\textsuperscript{98} Id. at 1162. For the text of the FCC policy at issue, see supra note 3.

\textsuperscript{99} Id. at 1157. The appeal was taken directly from the decision of the FCC to grant the permanent waiver. Id. at 1156.

\textsuperscript{100} Id. at 1159. Appellants argued that Fox seriously misrepresented the facts in setting a June 1, 1993 deadline for the termination of its offer. Id.

\textsuperscript{101} Id. See David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1260 (D.C. Cir. 1991) (fraudulent intent shown by misrepresentation together with proof that party making statement knows of falsehood); California Pub. Broadcasting Forum v. FCC, 752 F.2d 670, 680 (D.C. Cir. 1985) (FCC's denial of hearing on substantial and material factual dispute was arbitrary and capricious).

\textsuperscript{102} Metropolitan Council of NAACP Branches, 46 F.3d at 1159. See Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1985) (to warrant hearing, allegations must merely show substantial and material question of fact, not actually prove misrepresentation).

\textsuperscript{103} Metropolitan Council of NAACP Branches, 46 F.3d at 1159-60. Appellants urged that the Commission's determination that there was not a substantial question on Fox's misrepresentation was untenable, particularly in light of the FCC's long-established requirement that applicants be "scrupulous in providing complete and meaningful information." Id. at 1160 (quoting Lorain Journal Co. v. FCC, 351 F.2d 824, 830 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966)).

\textsuperscript{104} Id. at 1160. Appellants alleged that Fox had previously made misrepresentations in a comparative renewal proceeding for KTTV, Los Angeles. Id.

\textsuperscript{105} Id. (quoting Administrative Procedure Act, 5 U.S.C. §§ 701, 706(2)(A) (1988)). Using a deferential standard, the court needed to decide "whether the agency has articulated a rational connection between the facts and the choice made [and] may reverse only if the agency's decision is not supported by substantial evidence or the agency has made a clear error in judgment." Id. (quoting Kisser v. Cisneros, 14 F.3d 615, 619 (D.C. Cir. 1994)).
that the FCC arbitrarily and capriciously denied hearings on these alleged misrepresentations.\textsuperscript{106} The second issue addressed by the court concerned the ripeness of the waiver request and inadequacy of the evidence before the FCC.\textsuperscript{107} The court rejected appellants' contention that the waiver request was not ripe because agencies are not controlled by the case or controversy requirement.\textsuperscript{108} The court then rejected appellants' argument that the information before the FCC was incomplete.\textsuperscript{109}

The third issue considered by the court was whether recusal was required by any of the Commissioners who considered this case.\textsuperscript{110} Appellants urged that one of the Commissioners voting on the permanent waiver appeared to have prejudged the issue and should have recused himself.\textsuperscript{111} The court rejected this argument and called the \textit{ad hominem} attack on the Commission's decision "unfortunate."\textsuperscript{112}

\textsuperscript{106} \textit{Id.} See WHW Enters., Inc. v. FCC, 753 F.2d 1132, 1139 (D.C. Cir. 1985) (court attempts only to determine whether FCC's conclusions have support in record and are not arbitrary or capricious when reviewing Commission's application of standards for honesty and frankness).

\textsuperscript{107} \textit{Metropolitan Council of NAACP Branches}, 46 F.3d at 1161. Appellants asserted that the waiver request was unripe because Murdoch did not have a binding commitment to buy the Post. \textit{Id.} Appellants also argued that because there was no actual finished deal, the FCC did not possess all of the facts necessary to reach an informed decision. \textit{Id.}

\textsuperscript{108} \textit{Id.} While Article III of the Constitution requires a case or controversy before federal courts can decide an issue, agencies may issue declaratory orders to "terminate a controversy or remove uncertainty." \textit{Id.} (citing 5 U.S.C. § 554(e) (1988)). See Chavez v. Director, Office of Workers Compensation Programs, 961 F.2d 1409, 1414 (9th Cir. 1992) (ripeness doctrine limitation on federal judicial power under Article III of Constitution does not apply to administrative agencies).

\textsuperscript{109} \textit{Metropolitan Council of NAACP Branches}, 46 F.3d at 1161-62. The court found that the FCC could defer to the bankruptcy court's role in judging whether bids for the Post were fair. \textit{Id.} at 1162. Thus, the FCC could limit its inquiry to whether, in the event Murdoch was the successful bidder, a permanent waiver was in the public interest. \textit{Id.} In justifying this finding, the court reasoned that the bankruptcy court, in its efforts to dispose of the Post, could utilize safeguards to protect against manipulation of the sales process. \textit{Id.} The court concluded that the Commission was not required to order further hearings on the details of Murdoch's bid for the Post. \textit{Id.}

\textsuperscript{110} \textit{Id.} at 1164. The court stated that judicial review of a commission member's decision not to recuse himself was based on a "deferential, abuse of discretion standard." \textit{Id.} (citing Air Line Pilots Ass'n v. United States Dep't of Transp., 899 F.2d 1230, 1232 (D.C. Cir. 1990)).

\textsuperscript{111} \textit{Id.} See Cinderella Career and Finishing Sch., Inc., v. FTC, 425 F.2d 583, 590-91 (D.C. Cir. 1970) (agency chairman should have recused himself in light of public statement showing possible prejudgment of case).

\textsuperscript{112} \textit{Metropolitan Council of NAACP Branches}, 46 F.3d at 1164. The court ruled that it would overturn a commissioner's choice not to recuse himself only in situations where the commissioner had "demonstrably made up [his] mind about im-
The fourth and most significant issue on appeal addressed the propriety of FCC's grant of a permanent waiver to Fox.\footnote{113} The court first outlined appellants' arguments opposing the waiver.\footnote{114} First, appellants stated that the FCC failed to explain why it deviated from precedent by granting a permanent rather than a temporary waiver.\footnote{115} Appellants also alleged that Fox failed to meet the heavy burden of proof necessary to justify the granting of a permanent waiver.\footnote{116} Appellants stated that the permanent waiver not only "eviscerat[ed]" the long-standing cross-ownership rule, but also violated congressional intent that no federal funds be used to repeal or reexamine the rule.\footnote{117} Finally, appellants contended that the FCC's decision was arbitrary and capricious because it did not consider appellants' expert testimony that the New York market is non-competitive in its service of minority audiences.\footnote{118}

In response, the FCC stated that granting the waiver accommodated federal banking policies without frustrating the cross-ownership rule's goals of promoting competition and diversity.\footnote{119} The important and specific factual questions and [is] impervious to contrary evidence." \footnote{Id. at 1164-65 (quoting United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1209 (D.C. Cir. 1980), cert. denied, 455 U.S. 913 (1981)). The court found that no such situation existed in this case. Id. at 1165.}

\footnote{113. Id. at 1162.} \footnote{114. Id. at 1161-62.} \footnote{115. Id. at 1162. Appellants conceded that under Greater Boston Television Corp. an agency's view of what is in the public interest may change. Id. (citing Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)). Appellants asserted, however, that if an agency changes its course it must supply a reasoned analysis showing that prior policies are being deliberately changed as opposed to casually ignored. Id. (citing Greater Boston Television Corp., 444 F.2d at 852).}
\footnote{116. Id. Appellants asserted that Fox had not met the requisite yet undefined "heavy" burden of proof necessary for a grant of a permanent waiver. Id. (citing News Am. Publishing, Inc. v. FCC, 844 F.2d 800, 809 n.4 (D.C. Cir. 1988); Health and Medicine Policy Research Group v. FCC, 807 F.2d 1038, 1042-43 (D.C. Cir. 1986)). Appellants claimed that Fox had to demonstrate that the permanent waiver was necessary and not merely beneficial to the Post's continued existence. Id. Appellants argued that Fox could not have met its "heavy" burden because Fox had failed to submit evidence that the permanent waiver was necessary. Id.}
\footnote{118. Id. Appellants urged the court to determine whether the agency properly considered all of the relevant factors. Id. (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Weyburn Broadcasting Ltd. Partnership v. FCC, 984 F.2d 1220, 1227-28 (D.C. Cir. 1971)).}
\footnote{119. Id. at 1162-63. The FCC argued that it should support the most beneficial sale of a bankrupt entity's assets if doing so would not unduly interfere with the Commission's obligation to ensure that licenses are used and transferred in accordance with the Communications Act. Id. (citing Telemundo v. FCC, 802 F.2d 513, 518 (D.C. Cir. 1986)).}
Commission reasoned that permanent, rather than temporary, waiver was appropriate based on the business reasons offered by Fox.\textsuperscript{120} The FCC noted that Murdoch could not be expected to sustain significant operating losses and undertake the substantial financial commitment necessary to revitalize the \textit{Post} without possessing the knowledge that he would not ultimately be required to sell either the newspaper or the television station.\textsuperscript{121} Further, the FCC determined that a permanent waiver would not significantly impact the diversity and competition concerns central to the cross-ownership rule.\textsuperscript{122}

The court found that, despite appellants' assertions to the contrary, no clear evidence existed that the FCC actually "changed course" when it granted Fox a permanent waiver.\textsuperscript{123} Since the rule's inception, the Commission specifically contemplated the possibility of granting permanent waivers in cases where strict application of the rule would not advance the goal of media diversity.\textsuperscript{124} The grant of the waiver, therefore, was merely a valid continuation of an established Commission policy.\textsuperscript{125}

Although previously the Commission granted permanent waivers only in cases involving preservation of existing ownership patterns, the court noted that this did not eliminate the possibility of

\textsuperscript{120} \textit{Id.} at 1163. Fox argued that a permanent waiver was imperative to its long term strategy for reviving the \textit{Post}. \textit{Id.} Fox stated that without a permanent waiver it could not conclude meaningful negotiations with the \textit{Post}'s labor unions, suppliers, distributors, creditors and advertisers. \textit{Id.}

\textsuperscript{121} \textit{Id.} The FCC argued that granting a temporary waiver would have been "meaningless" because such a waiver would not have satisfied the necessity of finding a viable bidder for the paper. \textit{Id.} With only a temporary waiver, Murdoch would not have pursued his bid for the \textit{Post} and the bankruptcy court may have been without viable offers. \textit{Id.} According to the Commission, granting the permanent waiver benefitted the debtor, the creditors and the bankruptcy court by removing uncertainty regarding the viability of the primary bidder. \textit{Id.}

\textsuperscript{122} \textit{Metropolitan Council of NAACP Branches}, 46 F.3d at 1163. The FCC noted that it lacked authority to decide on any applications based on the possible content of a newspaper. \textit{Id.} The Commission also stated that the record did not support appellants' view of the New York market. \textit{Id.} The Commission found that the New York media market possessed attributes making it uniquely competitive, and that the \textit{Post} and Murdoch's television stations controlled a very small share of the audience and advertising in the market. \textit{Id.}

\textsuperscript{123} \textit{Id.} The FCC had always provided for waiver of the cross-ownership ban in exceptional circumstances. \textit{Id.} (citing FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 786 n.9 (1978); Health and Medicine Policy Research Group v. FCC, 807 F.2d 1038, 1041 n.4 (D.C. Cir. 1986)).

\textsuperscript{124} \textit{Id.} (citing News America Publishing, Inc. v. FCC, 844 F.2d 800, 805 (D.C. Cir. 1988); Second Report and Order, 50 F.C.C.2d 1046, 1076 n.24 (1975)). For the full text of the waiver policy, see \textit{supra} note 66.

\textsuperscript{125} \textit{Metropolitan Council of NAACP Branches}, 46 F.3d at 1163.
granting permanent waivers in extraordinary circumstances.\textsuperscript{126} Further, the court reasoned that because the Commission had historically retained the authority to grant waivers under extraordinary circumstances, the grant of a permanent waiver did not violate the congressional ban on FCC repeal or reexamination of the cross-ownership rule.\textsuperscript{127}

The court determined that, based on the evidence submitted by Fox, the Commission had a reasonable basis to warrant a permanent waiver.\textsuperscript{128} The court considered the detailed explanation provided by the FCC and accepted the Commission's conclusions that Fox had met the heavy burden required for a permanent waiver.\textsuperscript{129} Moreover, the court found that such a waiver best served the public interest and was entitled to "substantial judicial deference."\textsuperscript{130}

The court acknowledged, however, that the speculative nature of determining the course of future public interest required deductions based on the specific and expert knowledge and experience of the FCC.\textsuperscript{131} Consequently, the court determined that absolute factual support in the record for the Commission's judgment or prediction was neither necessary nor requisite.\textsuperscript{132} The court also agreed with the Commission's finding that appellants' arguments concerning the editorial content of a newspaper should be disregarded because the cross-ownership rule could not lawfully be based on a party's political, economic or social views.\textsuperscript{133} The court thus upheld the FCC's decision, finding that the Commission's

\textsuperscript{126} Id. (citing Field Communications Corp., 65 F.C.C.2d 959 (1977). In Field Communication Corp., the Commission allowed for a permanent waiver of the cross-ownership rule in a situation where the transaction in question did not actually create a new ownership pattern. Field Communications Corp., 65 F.C.C.2d at 959. At the same time, the Commission noted that permanent waivers could be granted based on the exigencies of the circumstances involved. Id. For a full discussion of Field Communications Corp., see supra notes 82-86 and accompanying text.

\textsuperscript{127} Metropolitan Council of NAACP Branches, 46 F.3d at 1163. For the text of the original congressional ban on the reexamination or repeal of the cross-ownership ban, see supra note 87.

\textsuperscript{128} Metropolitan Council of NAACP Branches, 46 F.3d at 1163-64. The court found that Fox's evidence about the necessity of establishing a long-term business plan for the Post was sufficient. Id. at 1164.

\textsuperscript{129} Id.

\textsuperscript{130} Id. (citing Health and Medicine Policy Research Group v. FCC, 807 F.2d 1038, 1043 (D.C. Cir. 1986)). According to the court, the fact that Murdoch previously had a temporary two-year waiver, and that the Post floundered when he divested it, gave additional support to the FCC's conclusion that a temporary waiver was not adequate. Id.

\textsuperscript{131} Id.

\textsuperscript{132} Id. (citing FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 814 (1978)).

\textsuperscript{133} Metropolitan Council of NAACP Branches, 46 F.3d at 1164.
grant of a permanent waiver to Fox was sufficiently supported by the record and not arbitrary or capricious.134

V. CRITICAL ANALYSIS

By affirming the FCC’s grant of the permanent waiver to Fox, the D.C. Circuit in Metropolitan Council of NAACP Branches v. FCC has, in effect, allowed both the Commission and the publisher/broadcaster to contravene the will and intent of Congress. The court found that the FCC had contemplated waivers in extraordinary circumstances since the rule’s adoption and, thus, the Commission’s determination that circumstances exist to warrant a waiver does not violate Congress’ ban on repealing or re-examining the rule.135 Furthermore, although permanent waivers had previously been contemplated, they had neither been contemplated nor granted in circumstances such as those surrounding Fox’s intended purchase of the Post.136 By granting the waiver to Fox, the FCC has permanently repealed the rule with respect to Fox’s ownership of the Post.137 This result is contrary to the congressional intent that no funds appropriated by Congress be used to repeal, change or re-examine the cross-ownership ban.138

In Greater Boston Television Corp. v. FCC, the D.C. Circuit acknowledged that the FCC could establish policies based on what it deemed to be in the public interest.139 The court stated that its function in reviewing such policy decisions is to assure that the agency gives reasoned consideration to all material facts and issues.140 While the Commission can alter its view of what is in the public interest, when making such a change, it is required to supply

134. Id. at 1166.
135. Id. at 1163.
136. For discussion of circumstances warranting permanent waiver, see supra note 66. For full discussion of the only other grant of a permanent waiver, see supra notes 82-86 and accompanying text.
137. The significance of the waiver granted to Fox is that it is permanent in nature and thus not subject to reconsideration. Thus, the policy considerations underlying a cross-ownership ban would permanently be circumvented by Fox’s ownership of the Post.
140. Greater Boston Television Corp., 444 F.2d at 851.
a reasoned analysis indicating that prior policies are changed intentionally and deliberately and not just casually ignored.\(^{141}\)

In *Metropolitan Council of NAACP Branches*, the D.C. Circuit found that the FCC did not actually change course by granting a permanent waiver to Fox.\(^{142}\) The court stated that the FCC contemplated granting such waivers in situations where strict application of the rule would defeat the rule's stated purpose of promoting diversity.\(^{143}\)

The court acknowledged, however, that permanent waivers had only been granted in situations preserving existing ownership patterns.\(^{144}\) Previously, when Fox approached the FCC about waivers, it requested and was granted temporary waivers only.\(^{145}\) This grant of a permanent waiver, at least with regard to Fox, was a "change in course" for the FCC. Further, while the FCC had initially provided for the grant of permanent waivers,\(^{146}\) only one such permanent waiver was granted during the eighteen years of the rule's existence, in a case involving "highly unusual facts."\(^{147}\) The *Metropolitan Council of NAACP Branches* case does not seem "highly

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141. *Id.* at 852. The Commission could not adopt a course that is arbitrary or unreasonable, but the Commission need not always continuously follow a course just because it has been in effect for a significant time. *Id.* at 859-60.

142. *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1163 (D.C. Cir. 1995). The FCC had always provided for waivers of the cross-ownership rule, both temporary and permanent, in exceptional circumstances. *Id.* (citing Second Report and Order, 50 F.C.C.2d 1046, 1076 n.24, 1085 (1975)).

143. *Id.* For the list of circumstances under which a waiver to the cross-ownership ban can be granted, see *supra* note 66.

144. *Metropolitan Council of NAACP Branches*, 46 F.3d at 1163. Only once, "in a case involving 'highly unusual facts,'" had the Commission actually granted a permanent waiver of the cross-ownership rule." *New Am. Publishing, Inc. v. FCC*, 844 F.2d 800, 803 n.4. (D.C. Cir. 1988) (citing *Field Communications Corp.*, 65 F.C.C.2d 959 (1977)). The court in *Metropolitan Council of NAACP Branches* concluded that although a waiver had been granted in a single, factually distinguishable case, this did not rule out the possibility of granting permanent waivers in other extraordinary circumstances. *Metropolitan Council of NAACP Branches*, 46 F.3d at 1163. For full discussion of *Field Communications Corp.*, see *supra* notes 82-86 and accompanying text.


147. *News Am. Publishing, Inc.*, 844 F.2d at 803. In considering the validity of Pub. L. 100-202, 101 Stat. 1329, *News America Publishing, Inc.* generally discussed the waiver process. *Id.* The court cited *Field Communications Corp.*, which was the only petition for permanent waiver granted by the Commission, as a case with "highly unusual facts." *Id.* This grant of waiver preserved an already existing news-
unusual." Previously, the Commission granted Fox a waiver in circumstances very similar to those in this case.\textsuperscript{148} If the court had looked at the history of the rule and the history of this case instead of only examining the regulation in which the ban was delineated, the court may well have concluded that the grant of a permanent waiver to Fox represents a deviation from the course the FCC had been maintaining.\textsuperscript{149} \textit{Greater Boston Television Corporation} requires the FCC to provide a more clearly reasoned analysis showing that the rule was not just being casually ignored.\textsuperscript{150}

Soon after the FCC promulgated the cross-ownership ban, the very validity of the ban was challenged as too restrictive and overreaching.\textsuperscript{151} In \textit{FCC v. National Citizens Committee for Broadcasting}, the Supreme Court validated the cross-ownership ban.\textsuperscript{152} The Court upheld the Commission's finding that such a ban would best serve the public interest by achieving greater diversity of viewpoints.\textsuperscript{153} The Court accepted the Commission's reasoning that the rule served the public interest and the First Amendment by assuring "the widest possible dissemination of information from diverse and antagonistic sources."\textsuperscript{154}

In this case, the FCC determined, and the D.C. Circuit agreed, that a permanent waiver served the public interest.\textsuperscript{155} The FCC and the court found that such a waiver was necessary to revitalize the \textit{Post} and to help the debtor, the creditors and the bankruptcy court.\textsuperscript{156} While these considerations are important to the public interest, they should not overrule the diversity interests grounded paper/broadcast combination. Field Communications Corp., 65 F.C.C.2d 959 (1977).

\textsuperscript{148} For discussion of this temporary waiver, see \textit{supra} notes 23-25 and accompanying text.

\textsuperscript{149} For discussion of the development of the cross-ownership ban, see \textit{supra} notes 55-66 and accompanying text. For discussion of Fox's prior dealings with the FCC regarding waiver of the cross-ownership ban, see \textit{supra} notes 73-81 and accompanying text.

\textsuperscript{150} For full discussion of \textit{Greater Boston Television Corp.}, see \textit{supra} notes 59-62 and accompanying text.


\textsuperscript{152} \textit{Id.} at 792. For a full discussion of \textit{National Citizens Comm. for Broadcasting}, see \textit{supra}, notes 67-72 and accompanying text.

\textsuperscript{153} \textit{National Citizens Comm. for Broadcasting}, 436 U.S. at 796. The Court found that by promulgating the cross-ownership ban, the Commission had not used unreasonable means to reach its goal. \textit{Id.}

\textsuperscript{154} \textit{Id.} at 785 (citing Second Report and Order, 50 F.C.C.2d 1046, 1048 (1975) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945))).

\textsuperscript{155} \textit{Metropolitan Council of NAACP Branches}, 46 F.3d at 1163.

\textsuperscript{156} \textit{Id.}
in the First Amendment.\(^{157}\) By upholding the permanent waiver in this case, and thereby precluding future consideration of the matter with respect to Fox and the \Post\, the court has allowed the FCC to place financial public interest above the First Amendment public interest that the ban was originally intended to serve. In \Metropolitan Council of NAACP Branches\, the financial public interest was discussed in terms of the "business reasons Fox offered showing that permanent waiver was necessary to its long-term strategy for reviving the \Post\."\(^{158}\) The court also acknowledged the financial commitment required of Murdoch and the convenience of permanent waiver for the \Post\, Murdoch and the bankruptcy court.\(^{159}\) While these reasons are not frivolous, they should not supersede the valuable First Amendment interests in promoting marketplace diversity through diverse voices on which the rule was based in the first place.

The D.C. Circuit upheld the validity of waivers of the cross-ownership ban granted to serve the public interest in \Health and Medicine Policy Research Group v. FCC\.\(^{160}\) The court found that factual determinations made by the Commission regarding waivers were of a judgmental and predictive nature.\(^{161}\) Therefore, the court's review of such determinations was limited to finding whether the determinations were "arbitrary and capricious."\(^{162}\) The court further found that the Commission's judgment regarding how to serve the public interest deserved substantial judicial deference.\(^{163}\) Finally, the court determined that in spite of the "scant"

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\(^{157}\) In \National Citizens Comm. for Broadcasting\, the FCC initially stated that First Amendment interests provided for the "widest possible dissemination of information from diverse and antagonistic viewpoints." \National Citizens Comm. for Broadcasting\, 436 U.S. at 785 (citing Second Report and Order, 50 F.C.C.2d at 1049). The underlying principle was that increased diversification of ownership more than likely would result in enhanced diversity of viewpoints. \Id.\ at 786 (citing Second Report and Order, 50 F.C.C.2d at 1076).

\(^{158}\) \Metropolitan Council of NAACP Branches, 46 F.3d at 1163.

\(^{159}\) \Id.

\(^{160}\) 807 F.2d 1038, 1041 (D.C. Cir. 1986). This case involved a prior temporary cross-ownership ban waiver request by Murdoch. \Id.\ at 1040. For full discussion of this case see supra notes 73-81 and accompanying text.

\(^{161}\) \Health and Medicine Policy Research Group, 807 F.2d at 1043. When the Commission makes such determinations, they do not require complete factual support in the record. \Id.\ (quoting \National Citizens Comm. for Broadcasting\, 436 U.S. at 814).

\(^{162}\) \Id.\ (citing Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982)).

\(^{163}\) \Id.\ The court found that "the scope of review is particularly limited when the FCC engages in 'the process of drawing lines, of making judgmental decisions.' " \Id.\ (citations omitted).
amount of evidence, it was sufficient to support the FCC's determination that a waiver was appropriate. 164

In Metropolitan Council of NAACP Branches, the court again gave considerable deference to the Commission's factual and evidentiary findings. 165 The court mentioned the heavier burden of proof required for a grant of a permanent waiver, but neither the FCC nor the courts have established the criteria required to satisfy this heavier burden. 166 Thus, while the Commission's evidentiary findings receive substantial deference, the court should have attempted to define the heavy burden, and determine whether Fox had actually met the burden required for permanent waiver as opposed to the burden required for mere temporary waivers.

In News America Publishing, Inc. v. FCC, the D.C. Circuit struck down a portion of legislation which prohibited the extension of existing temporary waivers of the cross-ownership ban. 167 As discussed above, Judge Robinson dissented, finding that Congress was rationally responding to what it perceived as a threat to the cross-ownership ban. 168 Judge Robinson's concerns about the Commis-

164. Id. at 1044. The court found that it could make such a finding because of the comparatively lenient evidentiary standard required for temporary waivers and the substantially degree of deference owed by the judiciary to the Commission in such instances. Id. at 1044-45.

165. Metropolitan Council of NAACP Branches, 46 F.3d at 1163-64. The court stated that the FCC could have reasonably found that the evidence Fox submitted was sufficient. Id. at 1164.

166. Id. at 1163. The court stated "the burden on an applicant for a permanent waiver is considerably heavier than for a temporary one." Id. n.1 (quoting News Am. Publishing, Inc. v. FCC, 844 F.2d 800, 803 (D.C. Cir. 1988)). However, News America Publishing Inc., cites Health and Medicine Policy Research Group for this proposition. News Am. Publishing, Inc., 844 F.2d at 803 (citing Health and Medicine Policy Research Group v. FCC, 807 F.2d 1038, 1042-43 (D.C. Cir. 1986)). The Health and Medicine Policy Research Group court discusses two distinct evidentiary standards. Health and Medicine Policy Research Group, 807 F.2d at 1042-43. However, these standards are the burdens of proof for establishing inability to sell a station as opposed to ability to sell a station only at an artificially depressed price. Id. The court expressly stated that it was not contemplating permanent waivers because such conditions (inability to sell or ability to sell only at an artificially depressed price) were "not . . . expected to endure indefinitely." Id. at 1042 (citing Second Report and Order, 50 F.C.C.2d 1046, 1085 n.46 (1975)).

167. News Am. Publishing, Inc., 844 F.2d at 815. The latter part of the provision, Pub. L. 100-202, 101 Stat. 1329 (1987), was struck down as underinclusive and unreasonable because it applied only to Murdoch. Id. The court did not review the portion of the provision prohibiting the FCC from re-examining or repealing the cross-ownership rule, finding that prohibition was not ripe for review. Id. at 802 n.1. For full discussion of this case, see supra notes 87-92 and accompanying text.

sion's erosion and possible abandon of the cross-ownership ban are embodied by the grant of the permanent waiver. Such a waiver allows for complete circumvention of congressional intent by the Commission and the publisher/broadcaster.

Judge Robinson stated that over time, the FCC's position on the rule had changed, and that the Commission had indicated it might favor revision or outright repeal of the rule. However, because of the congressional ban on the use of appropriated funds to re-examine or repeal the cross-ownership ban, the Commission may not effectuate any revision or elimination of the rule.

According to Judge Robinson, by enacting the ban on re-examination and repeal of the cross-ownership rule, Congress was reacting to what it perceived as the threatened erosion and possible eradication of the cross-ownership ban. Members of Congress desired to preserve the integrity of the cross-ownership rules, and were concerned about abuse of the waiver process. Judge Robinson stated that the retreat from the rule justified congressional fears that the FCC would unjustifiably grant a waiver to News America.
In upholding the FCC’s grant of a permanent waiver to the cross-ownership rule, the court gave substantial deference to the findings of the Commission.\footnote{174} Without any meaningful discussion, the court accepted each of the FCC’s arguments.\footnote{175} The court affirmed the FCC determination that Fox had met the “heavy” burden required for the grant of a permanent waiver without defining this key term.\footnote{176} As a result, the court has created a precedent that the FCC can, contrary to the will of Congress, affect the de facto elimination of the ban on cross-ownership of newspapers and television stations within a single media market.

VI. IMPACT

Congress recognized the FCC’s movement toward repealing the cross-ownership rules and attempted to strengthen the ban’s existence by enacting legislation.\footnote{177} Congress clearly established its intent that the cross-ownership ban continue to serve its original diversification goals even if the Commission no longer favored the rule.

The D.C. Circuit’s decision in Metropolitan Council of NAACP Branches v. FCC allows the Commission to circumvent Congress’ desire for diversification of viewpoints. This holding allows the FCC to justify a permanent waiver based on fairly minimal showings. While the court acknowledged that a “heavy” burden must be met,\footnote{178} it does not define this burden and in essence accepts the FCC’s argument that a permanent waiver may be granted without a showing that more than a temporary waiver is warranted.\footnote{179} This case may therefore sound the death knell for the cross-ownership ban. While the rule will continue in effect, the Commission and a

\begin{footnotes}
\item 174. Metropolitan Council of NAACP Branches v. FCC, 46 F.3d at 1164.
\item 175. Id. at 1162-64.
\item 176. Id. at 1163.
\item 178. Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154, 1163 (D.C. Cir. 1995).
\item 179. Id. at 1162-64.
\end{footnotes}
publisher/broadcaster such as Rupert Murdoch now have a blueprint for sidestepping the ban and Congress' wishes.

The Commission, an "arm of Congress," has successfully molded the permanent waiver into a tool for circumventing and frustrating congressional desire to promote viewpoint diversity through the cross-ownership ban. A publisher/broadcaster can apply to the FCC for a permanent waiver making a less than significant showing of need. Fox and Murdoch may, in fact, have satisfied one of the criteria for a waiver. However, a finding that circumstances warrant temporary waiver should not allow the FCC to eviscerate the cross-ownership ban by casting aside its long standing policy of granting temporary waivers and instead granting a permanent waiver. Already disfavoring the ban, the Commission can now find that the "heavy" burden necessary for a permanent waiver has been satisfied. Because of the substantial deference given to the Commission in Metropolitan Council of NAACP Branches v. FCC, the FCC may grant these waivers without significant concern that the grant will be reversed by the judiciary.

Perhaps, however, a re-examination of the cross-ownership rule is in order. At the time of News America Publishing, Inc. v. FCC, the Commission stated that increases in the number of media outlets available in a given market would provide the Commission with a good reason to re-evaluate whether the cross-ownership rule continued to be necessary to further the public interest. Current arguments urge that viewpoint diversity in media markets is now the norm, not the exception, and thus no longer needs protection. Opponents to the cross-ownership ban argue that although the rule may have been an appropriate response to the conditions existing when it was promulgated, it did not account for inevitable technological advances. Because the diversity rationale may no longer have support in the telecommunications market conditions that ex-

180. For the list of the four situations in which the grant of a waiver is appropriate, see supra note 66.
181. Devins, supra note 6, at 168 n.135 (citing Corrected Brief for the FCC at 21 n.6, News Am. Publishing, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988)).
182. Emord, supra note 11, at 445. Significant expansion of the range and depth of viewing and listening options, along with substantially open entry into new electronic media markets is the trend in the communications industry. Id. Thus, the original fears of economic and viewpoint monopolization that underlie the cross-ownership ban are not likely to materialize. Id.
183. Hoffman, supra note 2, at 347. The Commission's desire to allow more voices into the marketplace is no longer a concern because "[t]oday's telecommunications market offers individuals a plethora of information outlets to which they have access on a daily basis." Id. (citing In re Syracuse Peace Council, 63 R.R.2d 541, 577 (1987)).
ist today, the cross-ownership rule potentially infringes upon freedom of expression by limiting the opportunities a publisher/broadcaster has to supply additional media in large market areas.\(^{184}\)

The ban, for all intents and purposes, will no longer be effective unless an anti-cross-ownership Congress can enact new legislation to buttress the ban and mitigate the effects of *Metropolitan Council of NAACP Branches v. FCC*. Current technology has, however, eliminated some of the concerns for protecting market diversity.\(^{185}\) The cross-ownership ban certainly served the public interest at the time of its promulgation. However, Congress should recognize that the rule is both ineffective, especially after *Metropolitan Council of NAACP Branches v. FCC*, and unnecessary due to advances in technology. Congress should realize that the cross-ownership ban no longer serves the public interest and should eliminate legislative restrictions on the FCC to allow the Commission to effect a *de jure* repeal of the ban to match the *de facto* repeal already in place.

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184. *Id.* at 350-51.
185. For discussion of these technological advances, see *supra* notes 15-17 and accompanying text.