



herein as "Viacom") in this proceeding.

In opposing the Viacom motion, CFA/UCC emphasize that it is the *public's* "paramount" First Amendment right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 267, 390 (1969). Consideration of this predominant interest compels denial of the *Emergency Motion*. CFA/UCC also address why Viacom has little likelihood of prevailing on the merits of its case, and because a stay of Viacom's divestiture mandate would harm citizens and otherwise impede the public interest. Accordingly, the Court should deny Viacom's *Motion*.

### **BACKGROUND**

CFA/UCC appear before this Court on behalf of their members and other citizens who are regular television viewers. It is these individuals' right to have access to information which lies at the heart of the FCC's statutory mandate to insure that broadcast licensees operate in the public interest. Cite to UCC I.

On November 16, 1999, CBS Broadcasting, Inc. and Viacom, Inc. filed applications with the Federal Communications Commission (FCC) seeking approval of the transfer of CBS' broadcast licenses to Viacom. *See Shareholders of CBS Corporation and Viacom, Inc.*, 15 FCC Rcd 8230, 8231 (2000) ("*Viacom Merger Order*").

Grant of the applications would have give the merged entity a 41% national television "audience reach" in violation of rules which, then and now, establish a 35% limit. *Id.* at 8235; 47 CFR §73.3555(e). However, claiming that they needed additional time for an orderly divestiture rather than a "fire sale," CBS and Viacom requested and received a *temporary* waiver of that requirement, giving Viacom 12 (rather than the requested 24) months to come into compliance

with the ownership cap. *Id.*<sup>2</sup>

It is of material significance that Viacom challenged neither the constitutionality nor the rationality of the 35% cap in its merger application. Nor did it request a permanent waiver. Viacom then accepted the 12 month divestiture mandate without objection; it did not file a petition for reconsideration with the FCC, and it not appeal to this Court. Instead, Viacom moved to consummate the transaction almost immediately thereafter. Consequently, 30 days after release of the Commission's May 3, 2000 approval order, the divestiture obligation became final, and neither the FCC nor this Court thereafter has had jurisdiction to review it. Cite to 405, Central?

It is also important to stress that neither Viacom nor CBS have at any time challenged the constitutionality of the national TV ownership cap during the pendency of the FCC's statutorily mandated Biennial Review process. Cite to 202. That statute directs the FCC to review its various regulatory obligations with a view towards lifting or relaxing rules which have become obsolete or unnecessary. cite 202. While the two companies had each filed comments and belatedly attempted to ask for repeal of the national TV ownership cap, their arguments were exclusively addressed to whether the FCC should exercise its discretion to repeal the rules. The companies were surely aware that the deadline for completion of the then-pending proceedings was May 26, 2000, and that it was at least possible that the FCC would act favorably upon their request for repeal of the national TV ownership cap on or before that date. However, as noted above, Viacom did not await the completion of the Biennial Review before

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<sup>2</sup>CFA observes that Viacom must also divest its interest in UPN to comply with the Commission's rule that no entity may hold two networks. *See* 47 CFR §73.658 ("Dual Network Rule"). Viacom has not sought relief from that divestiture requirement, either before the FCC or in this proceeding.

consummating its CBS acquisition.

On May 26, 2000 the FCC completed its review, announcing that ownership concentration in the broadcasting industry did not justify relaxing the 35% national broadcast television ownership cap. At the same time, examining whether competition had displaced the need for regulation, as required by §202(h), the FCC exercised its discretion to place a higher priority on the relaxation and/or repeal of certain other rules.<sup>3</sup> See *In re 1998 Biennial Regulatory Review*, 15 FCC Rcd 11058 (2000) ("*Biennial Review Report*").<sup>4</sup> Fox Television later sought review of the decision not to raise the national broadcast ownership cap. Viacom subsequently filed its own motion (**for what?**) on August 4, 2001.<sup>5</sup>

On March 2, 2001, a panel of this Court issued a decision in an entirely unrelated case, *Time Warner Entertainment Co., L.P. v. FCC*, \_\_\_ F.3d \_\_\_, 2001 WL 201978 (March 2, 2001) ("*TWE*"). There, the court addressed the validity of the FCC's *cable* horizontal ownership limits. *Id.* at \_\_\_. Previously, the Court had upheld the facial constitutionality of the statutory

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<sup>3</sup>Notably, the FCC did announce it intended to launch a *Notice of Proposed Rulemaking* on whether to relax or eliminate the Dual Network Rule. [CITE] It subsequently did begin a proceeding [CITE], which remains pending. As observed in n.2 *supra*, Viacom is required to comply with the Dual Network Rule, and has not sought relief from this obligation. The FCC also decided to eliminate the experimental broadcast ownership restrictions. See *Biennial Review Report*, 15 FCC Rcd at 110666-70; *In re Elimination of Experimental Broadcast Ownership Restrictions, Report and Order*, released March 28, 2001.

<sup>4</sup>The *Biennial Review Report* explained that the Congress' determination to increase the cap from 25% to 35% as part of the Telecommunications Act of 1996, see §202(c)(1)(B), Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), combined with relaxation of other rules governing the broadcast television licensees, had prompted increased concentration in the broadcast market. *Id.* at 11072-75. This concentration was aggravated by concentration in the video programming market generally. *Id.* at 11073-74.

<sup>5</sup>This Court has before it pending motions to dismiss the Fox and related petitions alleging that the Biennial Review decision is not a reviewable order. cite.

mandate that the FCC establish national limits on cable television system ownership. *Time Warner Entertainment Co., L.P. v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000). In this second "as applied" challenge, however, the Court held that the FCC's asserted justification for the 30% limit it had established did not withstand intermediate scrutiny in light of the statutory directive that it base its action on competitive considerations. [CITE]

On March 9, 2001, Viacom filed a *Petition for Emergency Relief* with the Commission, asking for suspension of the requirement that it comply with the 35% national broadcast television ownership cap pending review this Court's review of the FCC's decision to leave the cap intact. Viacom argued that this Court's decision in *TWE* cast doubt on the validity of the 35% cap. On March 14, 2001, the FCC denied Viacom's request, and Viacom filed the *Motion* at issue here.<sup>6</sup>

### SUMMARY

To receive interim injunctive relief, Viacom must show (1) that it will suffer irreparable harm in the absence of relief; (2) that it is likely to prevail on the merits; (3) an absence of harm to other parties if relief is granted, and (4) that there is no risk of harm to the public interest. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977).

Viacom fails both the third and fourth prongs of the test set forth by this Court for injunctive relief. *Virginia Petroleum Jobbers*, 259 F.2d at 925; *Holiday Tours*, 559 F.2d at 843.<sup>7</sup>

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<sup>6</sup>Viacom filed a *Motion* on March 19, but subsequently filed a conforming *Motion* on March 20, displacing the March 19 *Motion*.

<sup>7</sup>Although CFA/UCC focus here on other aspects of the *Virginia Petroleum Jobber* test, they also support the arguments of other opponents that Viacom will not suffer irreparable harm. Unlike

Granting Viacom relief will cause harm not merely to Viacom's competitors, but also to the viewing public entitled to enforcement of the FCC's *Merger Order*. As this Court has observed:

It is the public and individual communities throughout the length and breadth of our country who must bear final responsibility for the quality and adequacy of television service . . . Under our system, the interests of the public are *dominant*. The commercial needs of licensed broadcasters and advertisers must be integrated into those of the public...Nor need the public feel that...they are unduly interfering in the private business affairs of others....They are the owners of the channels of television-- indeed, of all broadcasting.

*Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966). *Accord Red Lion*, \_\_\_ (Paramount Quote); *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, \_\_\_ (1945) ("it is the public interest, not any private interest, which is paramount").

Grant of interim relief, possibly stretching for years during the pendency of a remand, will harm the public interest by forcing the public to endure for an indefinite period concentration within the media on a scale the FCC determined is contrary to the public interest for more than 12 months -- and which Congress has determined is generally contrary to the public interest. Given the vital role the mass media -- and particularly broadcast television -- play in maintaining a democratic society and an informed electorate, *see* [*CBS v DNC*; *Red Lion*], such concentration constitutes a significant public interest harm. *Cf. Turner I* [multiplicity of sources quote]

Viacom argues that it is entitled to interim relief it never requested *even in its initial merger application*. This argument will certainly fail on the merits. As an initial matter, this Court has stressed that "the Commission is entitled to preserve the finality of its decisions." *See*

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the public, which has a "paramount" First Amendment interest in seeing the divestiture enforced and diversity preserved, Viacom has no First Amendment right to a broadcast license. *NCCB, Red Lion*. While Viacom may suffer some financial losses if it sells its stations and then must buy them back, this is not an irreparable harm. In any event, the "harm" is entirely of Viacom's own making, and the Court should not rescue Viacom from the consequences of its business decisions.

*Tribune Co. v. FCC*, 133 F.3d 61, 70 (D.C. Cir. 1998) (citations omitted). Where a party has failed to protect itself by timely seeking judicial under 47 USC §402 or reconsideration under 47 USC §405 and 47 CFR §1.110, this Court lacks jurisdiction to any subsequent appeal. *Id.* at 66; *Central Television Inc. v. FCC*, 834 F.2d 186, 190 (D.C. Cir. 1987).<sup>8</sup> Since Viacom failed to seek review of the *Viacom Merger Order* within the statutory period, this court has no jurisdiction to review its request for relief from that *Order*.

Before the FCC, Viacom argued that this Court's decision in *TWE v. FCC* entitles it to interim relief. To open a closed proceeding, for which the statutory deadline has long passed, Viacom would have to argue that *TWE v. FCC* announced a new rule of law rendering application of the divestiture requirement unconstitutional or otherwise contrary to the public interest. Viacom, however, did not and does not even try to make this argument. Instead, it argues that *TWE v. FCC* strengthens the general arguments that the FCC must relax the 35% cap. This cannot constitute a changed circumstance that would warrant a finding by the FCC that relief would serve the public interest, and therefore cannot remove the statutory bar against reconsidering the *Viacom Merger Order*.

Furthermore, both the Constitutional issues and the statutory scheme presented in *TWE v. FCC* differ radically from those found here. In *TWE*, the Court applied intermediate scrutiny applicable to cable television under *Turner I*, [slip op. at \_\_\_] and concluded that the Commission had failed to justify a 30% ownership limit in light of the Court's reading of §613(f) of the

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<sup>8</sup>Viacom has consistently attempted to evade this jurisdictional issue by styling its *Motion* before the Commission and its substantive motion here as part of its general challenge to the national broadcast television cap. The FCC saw through this sham, and properly transferred consideration of Viacom's *Emergency Motion* to the *Viacom Merger* docket.

Communications Act. *Id* at \_\_\_\_\_. In considering Fox's challenge to the 35% national broadcast television ownership cap, however, the Court must apply an entirely separate analysis. Rather than intermediate scrutiny, the court must afford the FCC broader latitude under the First Amendment principles enunciated in *Red Lion Broadcasting Co., Inc. v. FCC*, [CITE]. See *Turner I; Tribune Co.*, 133 F.3d at 69 (observing that *Red Lion* still "rules the broadcast jungle").

Second, the statutory scheme at issue in the Fox Appeal makes the *TWE* analysis totally inapposite. In *TWE*, the FCC formulated the 30% cable horizontal limit. By contrast, Congress itself set the national broadcast television cap at 35%, after extensive legislative consideration of what would best serve the public interest. [CITE] As such, the 35% cap must be judged "by a standard much more deferential than [accorded] to judgments of an administrative agency." *Turner Broadcasting System, Inc. v FCC*, 520 U.S. 180, 195 (1997) (*Turner II*).

The Court found that the explicit language of the §613(f) of the Communications Act, which required the FCC to create the cable horizontal ownership limit, forbade the FCC from considering diversity. [CITE] Instead, the language required the FCC to focus exclusively on whether cable operators could "unfairly" impede the flow of video programming due to the absence of "effective competition." [CITE] The national broadcast television ownership cap, however, is explicitly grounded in the diversity principle. *National Citizens Committee*.

Also in *TWE*, the Court found that Congress' decision to state a purpose for the cable horizontal ownership limit -- "in order to enhance effective competition" -- required the FCC to consider the cable horizontal ownership limit as distinct and separate from the rest of the Communications Act. [CITE] Section 202(h) requires precisely the opposite. It requires the FCC to regularly re-evaluate its *entire* broadcast regulatory scheme as an organic whole, to determine

whether *any* rules no longer serve "the public interest," *i.e.* diversity and fostering competition.<sup>9</sup>

Finally, even if the Court were to conclude that the Commission had not adequately justified its decision to retain the 35% ownership cap in the Fox Appeal (the thrust of Viacom's argument in its *Emergency Motion*), it could in no event affect a condition imposed as part of a merger approved *before* the FCC's final decision to retain the cap.<sup>10</sup> Only if this Court were to find that the 35% cap was not merely irrational, but unconstitutional in all cases (a result the Court did not reach even in *TWE* [CITE]), would Viacom potentially be entitled to relief. Had the FCC decided in the *Biennial Review Report* to lift the cap above 41%, the *Viacom Merger Order* would still stand as a valid exercise of the FCC's merger review authority, particularly since it applied the rules as they existed at the time of the merger application and consummation. As the FCC observed in rejecting Viacom's March 9 *Request for Interim Relief*, Viacom has the burden of proving that changed circumstances make suspension of the divestiture requirement in the public interest. Viacom not only failed to carry this burden, it failed to show any relevant changed circumstance.

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<sup>9</sup>The FCC in fact fulfilled this duty by determining it would begin proceedings to modify or eliminate the Dual Network Rule and the restrictions on experimental broadcast licensees. [CITE] The decision to relax some rules and not others represents a valid exercise of the agency's discretion, to which this Court must defer, *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 952 (D.C. Cir 1993), as well as an appropriate allocation of scarce agency resources.

<sup>10</sup>In fact, it is unclear whether this court's decision in *TWE* would affect a condition on a *cable* merger condition imposed under the Commission's broad public interest standard applicable in mergers. [CITE Tristani dissent and *RCA v. FCC*] There is no justification for supposing that *TWE* could control conditions imposed in a broadcast merger particularly where, as here, the statutory deadline for reconsideration has passed.

## ARGUMENT

### I. GRANT OF INJUNCTIVE RELIEF WOULD CAUSE FAR GREATER HARM TO BOTH THE PUBLIC AND THE PUBLIC INTEREST THAN TO VIACOM, AND THUS SHOULD NOT BE GRANTED.

Viacom alleges that allowing it to avoid the terms of the FCC's *Divestiture Order* will harm no other parties and will serve the public interest. Viacom Motion at 5, 19-20. In making this allegation, Viacom ignores the interests of the American viewing public— the citizens who are the intended beneficiary both of the Commission's rules and of the analysis that this Court must perform to grant injunctive relief. [CITE *Red Lion*, *UCC*]

Under the third and fourth prongs of the *Virginia Petroleum Jobbers Holiday Tours* test, the Court must evaluate whether any other parties will be harmed by the requested relief and how the public interest will be affected. *Virginia Petroleum Jobbers*, 259 F.2d at 925; *Holiday Tours*, 559 F.2d at 843. Viacom attempts to speed past the third and fourth prongs of the test, ignoring the public's interests in its rush to receive permission to avoid its voluntarily-assumed obligations.

Members of the public, individually and collectively, will be harmed if Viacom does not divest its assets in accordance with the Commission's *Divestiture Order*. Grant of Viacom's request will deprive the public of diversity in the marketplace of ideas and of competition in the economic marketplace. The First Amendment, a final FCC merger decision, and valid FCC rules each provide benefits to which the public is entitled.<sup>11</sup> Moreover, unlike the economic harms to competitors that Viacom dismisses, Viacom Motion at 19, the losses of these rights are

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<sup>11</sup> As explained [above?], Citizen Intervenors vigorously oppose Viacom's conclusion that it is likely to prevail on the merits.

not speculative, but certain to occur if the divestiture is avoided.

Viacom claims that it will lose its First Amendment rights if it complies with the *Viacom Merger Order*. Viacom Motion at 9. Viacom ignores that there are competing rights at issue here, and that the balance in this instance is strongly weighted towards the public. Speaking for a unanimous Court, Justice White has said that

[T]he First Amendment...has a major role to play as the Congress itself recognized in [47 USC §] 326, which forbids FCC interference with "the right of free speech by means of radio communication." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-362 (1955); 2 Z. Chafee, *Government and Mass Communications* 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 *Harv. L. Rev.* 1 (1965). ***It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.*** That right may not constitutionally be abridged either by Congress or by the FCC.

*Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389-90 (emphasis added). As the Supreme Court has more recently said, "assuring the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I*, 512 U.S. at 662-63. By contrast, for over 70 years, the Supreme Court has consistently held that broadcasters such as Viacom have no First Amendment right to possess

a broadcast license. [STRING CITE]

The FCC concluded that the Viacom merger would benefit the public only if it included certain divestitures. *Viacom Merger Order* at ¶1, 15 FCC Rcd at 8231. Despite Viacom's attempt to construe this divestiture requirement as contrary to the diversity principle, the divestiture requirement is a classic example of the FCC applying the diversity principle, and as such deserves deference from this court. [CITE]

In addition to concluding that a properly conditioned merger would serve the public interest, the FCC also concluded that permitting Viacom to hold its stations for longer than 12 months would be contrary to the public interest. [CITE] This harm to the public is not speculative. The FCC, in the exercise of its expert and considered judgment, has determined that a corporation that owns multiple media outlets cannot, by definition, offer the same level of diverse editorial viewpoints if those outlets were separately owned. *NCCB, NBC*. If Viacom does not divest these assets it will not offer diverse editorial viewpoints and the viewers in these markets will be deprived of that information.

The Commission has already weighed the harms and benefits of a waiver extending beyond the current divestiture date, and rejected it as inconsistent with the public interest. Viacom originally sought 24 months to come into compliance with the national ownership rule. *Divestiture Order* at ¶18, 15 FCC Rcd at 8235. The FCC rejected this request and granted Viacom 12 months. The Commission specifically weighed a longer period and rejected it as inconsistent with prior FCC decisions considering the public interest and broadcast divestitures. *Id.* at ¶22, 8236. As the statutory guardian of the public interest, the FCC's decision in this regard should be accorded deference. *North Atlantic Westbound Freight Ass'n v. Federal*

*Maritime Commission*, 397 F.2d 683, 685 (D.C. Cir. 1968).

It should not be overlooked that permitting Viacom to remain at its current level of concentration will also harm economic competition within the industry. As the FCC has recognized, mergers are by their nature, anticompetitive. *Bell Atlantic/Nynex*. The FCC determined that the merger would not have generally anticompetitive effects within the industry if Viacom divested within a year. Viacom's continued ownership of the assets it is required to divest therefore harms both Viacom's direct competitors and the viewing public, who are deprived of the benefits of competition.

Viacom argues that granting the stay will preserve the *status quo*, but it is Viacom that actually seeks a change in circumstance. Under the *status quo*, no company, including Viacom, may own broadcast stations that reach more than 35 % of the national market. Viacom entered its agreement to sell to CBS with full knowledge of this rule. It apparently concluded the benefits *to the company* of the merger outweighed the harm *to the company*.<sup>12</sup> To now argue that the harms of divestitures now outweigh the benefits *to the public* ring hollow.

Extension of this 12 month merger by even a day imposes an irreparable injury to the public's First Amendment rights. *Elrod v. Burns*, 427 U.S. 347 (1976). The loss of competition in the marketplace of ideas, even more so than competition in the market, cannot be restored.

## **II. VIACOM IS FORECLOSED BY STATUTE FROM SEEKING THE REQUESTED RELIEF.**

Of particular importance to consideration of the instant *Motion* is this Court's oft-

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<sup>12</sup> Moreover, it even concluded that immediate consummation of the merger outweighed the harm inherent in a delay that would occur if Viacom sought reconsideration or judicial review of its merger order.

expressed concern that "the Commission is entitled to preserve the finality of its decisions." *Tribune Co.*, 133 F.3d at 70. The FCC determined on the basis of a detailed review of an extensive record that the merger of Viacom and CBS would not serve "the public interest, convenience and necessity" unless Viacom complied with the 35% ownership cap within 12 months of consummation. [CITE] Viacom failed to appeal that decision. Rather, it has sought "to accept a partial grant, yet later to seek reconsideration of its conditions," *Central Television*, 834 F.2d at 190, a course of action explicitly prohibited by this Court. *Id.*

In *Central Television*, Petitioners had sought to transfer a broadcast television construction permit. *Id.* at 188. The FCC ruled that part of the purchase arrangement, payment of a \$475,000 "consulting fee," in fact violated its rules, and approved the transfer subject to a condition that the parties reduce the payment to \$100,000. *Id.* at 189. The parties consummated the transaction, but also appealed the FCC's condition. *Id.*

The Court rejected this attempt to enjoy the benefits of a merger while seeking to evade the conditions:

Section 1.110 [of the FCC's rules] does not allow applicants first to accept a partial grant, yet later seek reconsideration of its conditions....Acceptance of a grant, with any attendant conditions, is presumed if no rejection occurs within thirty days of the grant's issuance.

*Id.* at 190. The Court also found that by consummating the merger, Central "impliedly accepted its partial grant" and thus "foreclosed Central's opportunity to contest [the condition], either by rejecting the entire grant, or by petitioning the Commission for reconsideration." *Id.* Granting Central relief would therefore "contradict the essential purpose of §1.1100" and circumvent the "full protection of the public and interests involved." *Id.* at 191. Accordingly, the Commission

found it lacked jurisdiction to consider Central's appeal. *Id.*

Viacom attempts to evade this jurisdictional argument by hitching its wagon to its pre-existing comments it made in an entirely separate proceeding, and in a pending proceeding before this court which it did not even initiate. *Cf. Atlantic Tele-Network, Inc. v. FCC*, 53 F.3d 1384 (D.C. Cir. 1995) (party appealing under 402(a) rather than 402(b) need not first seek re-consideration under 47 CFR §1.1100). *Tribune Co. v. FCC*, however, forecloses this attempt to end-run the statutory limit on the court's jurisdiction.

In *Tribune Co. v. FCC*, the purchaser of a broadcast license to challenge the FCC's conditional grant under both §402(a) and §402(b)(3). The court rejected this approach:

[a]s we have said before, the provisions for judicial review contained in §§402 (a) and 402(b) are mutually exclusive...having decided that ...§403(b)(3) is the proper avenue for review when the Commission grants an application subject to an unasked for condition, we dismiss the petition [under §402(a)].

*Tribune Co.*, 133 F.3d at 66 n.4.

In any event, the statutory deadline for a challenge under *either* §402(a) or §402(b) is long past. *See* 47 USC 402(c). Viacom should not be permitted to evade the statutory deadline for review through the sham of relating to a challenge to the Commission's rules initiated by another.<sup>13</sup> *Cf. Tribune*, 133 F.3d at 70.

Finally, the court has stated that "the basic reason for §1.110's exhaustion requirement [is] to protect the Commission's interest in crystallizing its position prior to review." Here, Viacom not only failed to seek rehearing under 47 CFR §1.110, *it actively represented to the Commission that it would abide by the 35% national broadcast television ownership cap.* Viacom

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<sup>13</sup>The initial petition for review of the Commission's *Biennial Review Report* was filed by Fox Television Stations, Inc. Viacom filed its petition subsequently.

consistently represented it would make whatever divestitures the Commission deemed necessary to comply with the rules. [CITE] Nor did it assert in its comments in the *Biennial Review Report* proceeding that it thought application of the 35% cap was unconstitutional as applied to its merger. The only issue it disputed with the Commission was the length of time to comply. If Viacom thought 12 months would be insufficient, it was required to request rehearing within 30 days under 47 USC §402(b) and 47 CFR §1.110.

*Tribune* speaks directly to this. There, the Tribune Company had requested a stay pending review by the FCC of its broadcast cross-ownership rules pursuant to §202(h) of the Telecommunications Act of 1996. *Tribune*, 133 F.3d at 70. The Court found that the Tribune's failure to seek reconsideration had deprived the agency of the right to adequately consider the issue. *Id.* Accordingly, the FCC was "entitled to preserve the finality of its decisions" and dismissed Tribune's appeal for want of jurisdiction. *Id.*

By contrast, Viacom never even *requested* such relief. Despite Viacom's knowledge that a decision by the Commission on whether to commence a rule making to relax the 35% cap was imminent, it did not ask for the relief that it requests now - a stay until the court completes its review of Fox's challenge to the *Biennial Review Report*, and, in the event the court remands, a further stay until the FCC resolves the remand. Indeed, because Fox filed its petition for review within the 30 days available to Viacom to file for reconsideration with FCC, Viacom could have requested this relief within the statutory deadline.<sup>14</sup>

Nor can it be said that such a request would have been futile. Two commissioners

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<sup>14</sup>The FCC released the *Viacom Merger Order* on May 3, 2000. Viacom was therefore required to file for reconsideration on or before June 2, 2000. Fox filed its Petition for Review on May 31, 2000.

dissented from the FCC's decision not to relax the 35% cap. [CITE]. *Cf. Tribune*, 130 F.3d at 69 (observing that two commissioners had endorsed granting Tribune a waiver pending review of the rule). Given that Viacom had never requested such relief, but had instead indicated throughout the merger review it would comply with a divestiture requirement to reach the 35% cap, it is impossible to say what the FCC's reaction would have been to a request for relief along the lines Viacom requests now.

This court should not allow Viacom to "sucker punch" the agency by pretending to acquiesce in the merger conditions, only to seek relief at the last minute. As a matter of statutory jurisdiction, the court is barred from considering Viacom's *Emergency Motion*. As a matter of policy, if finality is to have any meaning, the court should reject Viacom's attempt to reopen a proceeding after enjoying the benefits thereof, now that the time to comply has arrived. *Central Television*, 834 F.2d at 190.

**III. THIS COURT'S *TWE v. FCC* DECISION DOES NOT CONSTITUTE A CHANGED CIRCUMSTANCE WARRANTING RECONSIDERATION OF THE AGENCY'S DECISION.**

This Court has observed that "an agency's discretion is at its zenith when it fashions remedies to effectuate the charge entrusted to it by Congress." *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 952 (D.C. Cir 1993). The FCC determined that Viacom had failed to demonstrate why reopening the *Viacom Merger Proceeding* would serve the public interest. That determination deserves deference from this court, and should be affirmed.

**A. *TWE v. FCC* Does Not Create New Circumstances for Purposes of the Viacom Merger.**

Viacom's titular justification for its emergency motion is this court's decision in *TWE v. FCC*. Yet Viacom never explains why this case warrants reopening the long-closed merger proceeding. Rather, Viacom focuses the bulk of its argument on the supposed irrationality of the 35% national broadcast television ownership cap. This is utterly irrelevant to the question of whether the FCC should have granted Viacom last-minute relief from divestiture conditions it knowingly accepted.

It is telling that Viacom does not claim to this Court that *TWE v. FCC* announced a new constitutional rule that bars application of the 35% national broadcast television ownership cap. Rather, Viacom argues that *TWE v. FCC* re-enforces its arguments in its underlying challenge to the rule. *See Viacom Petition* at 4 (stating last in its litany of reasons for granting relief that *TWE v. FCC* "makes it even clearer" that Viacom's arguments against the rule will ultimately prevail). Viacom spends the bulk of its argument discussing the FCC's supposed irrationality in maintaining the 35% cap in light of a history fully known at the time Viacom voluntarily accepted the merger conditions. Indeed, Viacom did not even *mention* the Commission's March 14 *Order* denying its request for relief in its discussion of the background of its instant *Motion* for interim relief. *See Motion* at 5-7.<sup>15</sup>

Had Viacom wished to challenge the underlying validity of the cap as applied to the merger, it should have done so in a timely fashion pursuant to 47 USC §402. Alternatively, Viacom

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<sup>15</sup>Viacom did file a separate motion on March 19, seeking relief from the merger's divestiture conditions. That motion was a bare two pages in length, primarily protesting that the FCC had transferred its request for relief to the *Viacom Merger* docket.

could have waited a few weeks to consummate the merger until the statutory deadline for the *Biennial Review Report* permitted Viacom to assess the strength of the Commission's reasoning. It chose not to, and nothing in *TWE v. FCC* changes this.

**B. *TWE v. FCC* Does Not Provide Any Support to Viacom's General Attack On The Ownership Cap.**

This Court surely did not intend its decision in *TWE v. FCC* to invite an "open season" on all of the FCC's ownership restrictions. Nor did the Court suggest for a moment that any less deference was due to the FCC's judgement or predictive powers. [CITE]. The Court struck down the FCC's cable horizontal ownership limits for two reasons wholly inapplicable to the broadcast rules at issue here: the difference in First Amendment standard of review and the difference in statutory scheme.

**1. Viacom has no viable First Amendment claim**

The Court in *TWE v. FCC* identified a speech interest in owning a cable system, and that the FCC in restricting a cable operator's right to own a cable system impinged on that right. [CITE] By contrast, the Supreme Court has repeatedly emphasized that *there is no unqualified First Amendment right to a television broadcast license*. [Citizens Committee, Red Lion, NBC] While a broadcaster's actual speech activity is entitled to broad First Amendment protection [Ak Board; League of Women Voters], an FCC prohibition on ownership of a license on the basis of neutral criteria does not, under applicable Supreme Court precedent, give rise to a First Amendment claim. *NCCB, NBC*. To the contrary, the Supreme Court has expressly held that the Commission has the authority to order divestiture of licenses in the name of diversity, and that doing so "enhance[s] the diversity of information heard by the public without ongoing

government surveillance of speech." *Nat'l Citizens Committee* at 801-02 (citations omitted). Such restrictions "do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them." *Id.*

Thus, the very speech interest identified by the Court as the reason for applying intermediate scrutiny in *TWE* does not exist here. The FCC therefore need not prove here that the decision to retain the national broadcast television ownership cap at the 35% set by Congress satisfies the more exacting *O'Brien* test applied in *TWE*. It need merely show that its decision not to relax the 35% cap falls within the bounds authorized by Congress and flows from a rational exercise of its predictive judgment. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-96 (1981); *United States v. FCC*, 652 F.2d 72, 93 (D.C. Cir 1980). As discussed below, the FCC satisfied its statutory requirements and the decision to relax some rules and not others is a classic exercise of agency discretion to which this court owes the highest degree of deference owed an administrative agency. **NO!!!! CHEVRON IS NOT THE ANSWER TO EVERYTHING. THIS IS APPLICATION, NOT CONSTRUCTION, OF A STATUTE. THE FCC GETS FAR GREATER DEFERENCE.** [CITE *Chevron*] Indeed, since the 35% cap was formulated by Congress as part of an exacting legislative process, its is subject to even greater deference than that paid to an administrative agency under *Chevron*. See *Turner II*.

**2. The statutory scheme at issue makes the analysis in *TWE v. FCC* inapplicable.**

The Court in *TWE v. FCC* found that the specific language requiring the FCC to set a cable horizontal ownership limit on cable system operators, §613(f) of the Communications Act, prevented the FCC from relying on diversity when formulating the limit. The Court held that

Congress' use of the introductory phrase "in order to encourage effective competition," and its command that the FCC ensure that no group of programmers "unfairly" impede the flow of video programming to the public, required the FCC to justify the rule exclusively on the basis of whether a lack of competition permitted cable system operators to unfairly block entry by programmers into the multichannel video programming distribution market. [CITE]

By contrast, the national broadcast television ownership limit is grounded in diversity. *NBC*. While the FCC has authority to consider antitrust and competition issues, it is by no means required to make its decision on this basis. *NCCB*. To the contrary, it is empowered to base its broadcast decisions entirely on the basis of the diversity principle. [CITE]

Congress explicitly decided to retain the ownership cap on the basis of this public interest standard, [Good Leg. History], and declined to raise the cap further or eliminate it entirely. This stands in direct contrast to the Court's reading of §613(f) in *TWE v. FCC*.

Contrary to the arguments advanced by Viacom, §202(h) does nothing to alter this. Indeed, §202(h) does not even address the national broadcast ownership cap -- much less dictate any result or alter the fundamental analysis. Section 202(h) requires the FCC every two years to:

review its rules adopted pursuant to this section, and **all** its ownership rules... and shall determine whether **any** such rules are necessary in the public interest as a result of competition. The Commission shall repeal or modify **any** regulation it determines to be no longer in the public interest.

Section 202(h) (emphasis added). It is clear from this that, contrary to the Court's interpretation of §613 in *TWE*, Congress intended the FCC to conduct a regular review of all of its broadcast rules in the hopes that the competition envisioned by the act would reduce the need for regulation. [CITES] Congress did not single out the national broadcast ownership cap for any

special consideration, or divorce it from its traditional roots in diversity. To the contrary, §202(h) explicitly instructs the Commission to evaluate its broadcast rules (including the national broadcast television ownership cap) in light of its traditional public interest criteria, *i.e.*, concern for diversity.

Thus, *TWE* could not be less relevant to consideration of the 35% national broadcast television cap. Furthermore, as the above analysis shows, the FCC will ultimately prevail on the merits in the Fox Appeal. Accordingly, Viacom fails in the second prong of the *Virginia Petroleum Jobbers* and *Holiday Tours* test.

## **CONCLUSION**