

August 22, 2023

Marlene H. Dortch, Secretary  
Federal Communications Commission  
45 L Street NE  
Washington, DC 20554

Re: Application for Television Station License Renewal  
FOX Television Stations, LLC  
WTFX-TV, Philadelphia, Pennsylvania  
LMS File No. 0000213362

Dear Madam Secretary:

We have reviewed the August 2, 2023, Fox Television Stations, LLC (“FTS”) reply (the “Fox Reply”) to the Petition to Deny the license renewal application of WTFX-TV (the “Station”) that was filed on July 3, 2023, by The Media and Democracy Project (“MAD”, and the organization’s filing, the “MAD Petition”). Having done so, we believe that it is both appropriate and necessary to supplement the thoughts we set forth in our July 31, 2023, informal objection to the Station’s renewal application.

We are not lawyers. But one need not have a law degree to see the gaping holes in the Fox Reply.

During the last television renewal cycle in 2012, FTS<sup>1</sup> argued that the conduct of its parent company and of affiliates not directly involved in station operations cannot impact a station’s license renewal application, even if that conduct violates the FCC’s policy statements on licensee character. The Fox Reply takes essentially the same tack. But since the Media Bureau went out of its way to say that it did not endorse that position ten years ago,<sup>2</sup> FTS now clothes its position in a new cloak of legalisms and technicalities that have no more merit than its previous bald assertion.

The predicate facts justifying an FCC hearing on FOX’s questionable behavior have already been established by Judge Eric M. Davis of the Delaware Superior Court in his fine

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<sup>1</sup> There was a corporate restructuring of Fox News Channel’s and the Station’s common ultimate parent, Fox Corporation (“FOX”) in 2019, when FOX sold most of its assets to The Walt Disney Corporation. In this discussion, FTS is used to refer to both the current immediate holder of the Station’s television license (an LLC) and its 2012 predecessor in that role (a corporation of the same name), and FOX to refer both to the current ultimate parent and to Twenty-First Century Fox, Inc., the 2012 publicly traded parent – which like current FOX was controlled by Rupert Murdoch and the family trust that he personally controls.

<sup>2</sup> Letter Opinion *Re: Application for Renewal of License of WUTB, Baltimore, ID No. 605552, File No. BRCDT-20120531AJL, et al*, DA 13-1007 at p.7 n.65 (Video Division May 6, 2013), found at <https://docs.fcc.gov/public/attachments/DA-13-1007A1.pdf>.

summary judgment opinion in the Dominion defamation litigation, attached to the MAD Petition. Judge Davis found that the Station’s commonly controlled sister entity, Fox News Channel (“Fox News”), had repeatedly broadcast crystal clear falsehoods about an extremely significant event – the 2020 election -- over an extended period of time – a course of conduct that we respectfully suggest is so egregious as to shock the conscience.<sup>3</sup> He supported his judgment by specific reference to a factual record replete with evidence extrinsic to the broadcasts in question, which established that the falsehoods broadcast were neither mistakes nor mere expressions of questionable opinions. Rather, he found the broadcasts to be deliberate choices made in an effort to retain viewers, despite doubts as to the veracity of the “facts” being broadcast on the part of Fox News personnel, on-air talent, and parent FOX management including Rupert and Lachlan Murdoch. ***The behavior by Fox News that Judge Davis found the Dominion record established – broadcast in a news context of false purportedly factual information about a significant event, demonstrated by extrinsic evidence as having occurred by choice and neither occasionally nor by mistake – is exactly the type of behavior that the FCC’s long-established news distortion policy<sup>4</sup> would require the Commission to address if a broadcast licensee -- such as the Station and the other FNC stations that are all under common FOX/Murdoch control with Fox News – were to engage in it. The Commission cannot ignore that behavior here merely because the channel involved is a commonly controlled sister cable channel rather than a Commission television licensee.***

Yet the Fox Reply urges the Commission to do just that -- ignore the behavior—for a variety of reasons.

First, there is FOX's entirely spurious attempt to hide behind the First Amendment's free speech guarantee.

Almost all wrongdoing involves some speech, but even Bernie Madoff did not claim he possessed a free-speech right to defraud his victims. Here, though, FOX goes beyond Madoff: it seeks in effect to assert a First Amendment right to lie as needed to retain its audience, and as a corollary, asserts that a pattern of adjudicated Fox News lies over an extended period of time should have no adverse consequences with respect to FOX’s special FCC-granted privileges to operate television stations as a public trustee.

The Commission need not delve deeply into the details of any Fox News speech to see that this position has no merit. Judge Davis already done that, and has adjudicated the crystal clear falsity of that speech. What the Commission must now consider, through both appropriate fact-finding proceedings as to the factual questions left undecided in Judge Davis’ partial summary judgment opinion<sup>5</sup> and through an analysis of the legal consequences flowing from the

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<sup>3</sup> Such conduct can form the basis for a Commission character inquiry in connection with a license renewal. *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1205 n.60 (1986)

<sup>4</sup> The policy is found at <https://www.fcc.gov/broadcast-news-distortion>.

<sup>5</sup> Judge Davis decided not to make a summary judgment finding on whether the Fox News falsehoods were broadcast with “actual malice” (knowledge of, or reckless disregard for, falsity), or on whether parent FOX (operated day to day by the Murdochs) also “published” the

facts it finds, is whether the behavior of parent FOX and the Murdochs meets the high character standards the Commission should expect of its licensees.

That's right – despite the Fox Reply's strenuous efforts to obscure the point through First Amendment rhetoric, the character and public-interest standards of the Federal Communications Commission are in fact standards of behavior, not speech. And in invoking the Commission's character standards, MAD through its petition is asking the FCC to weigh FOX's behavior, not asking the Commission to evaluate or sanction the content its speech. Specifically, the FCC must consider sins of omission and commission of the Station's ultimate owners in their supervision and control of the Station's commonly controlled sister channel, Fox News.

The behaviors in question, documented in great detail in the public record of the Dominion litigation and outlined in greater detail above, can be summarized simply;

- Fox News was, in essence, deliberately defrauding its viewers by broadcasting not facts, but what those viewers wanted to hear;
- The public record suggests that FOX and the Murdochs consciously decided to let Fox News broadcast adjudicated falsehoods in order to protect the channel's revenues and ratings; and
- The record further suggests that choice was made in spite of baldly apparent wrongdoing by their employees, and in spite of the harms to civil society and

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falsehoods. Rather, he chose to leave those fact-finding tasks for the jury. But these precise factual determinations – whether the behavior of FOX and the Murdochs was merely negligent or worse, and whether the Murdochs were so involved in decisions to broadcast the falsehoods that they “published” them along with Fox News – are the determinations most relevant to the character and fitness of FOX and the Murdochs to control broadcast licensees.

Judge Davis also appointed a special master to investigate FOX discovery misconduct, as we discussed in our previous submission -- though that investigation was scuppered by FOX's settlement of the underlying Dominion litigation. Because licensee lack of candor in dealing with governmental bodies is a particular concern under Commission precedents, we believe that these discovery misconduct issues also require fact-finding in a hearing to determine whether FOX's behavior reaches a level that would require Commission sanction under established precedent.

Since Judge Davis has found bad Fox News behavior under FOX/Murdoch control, of a type that falls within the scope of the Commission's regulatory expertise, we respectfully submit that the Commission has a duty to hold a hearing, to make the further factual determinations relevant to licensee character that were left open under Judge Davis' summary judgment decision and special master order, and to determine in light of the factual findings it makes whether the individuals and company who ultimately control the Station are of the good character and have the public interest commitment required of Commission television licensees.

democracy that are not only apparent in retrospect, but that were obvious even at the time.

This behavior, these acts and omissions – conscious choices, each and every one -- surely justify and require an inquiry into whether FOX and its owners are capable of choosing principle and the public interest over mere profit.

Second, the Fox Reply argues that the FOX owners' questionable behavior in managing their sister cable property is irrelevant to their qualification to continue as broadcast licensees. Irrelevant? Here we see another gaping hole: an argument as laughable as a philanderer's claim that his dalliance is of no consequence because it occurred outside the marital bed.

The question posed to the Commission is a clear one: is a certain modicum of moral literacy essential to retaining a broadcast license, or is it "irrelevant"? Character is character, and behavior is behavior. They speak for themselves, no matter the particular context in which they are revealed. If a broadcast licensee shows poor judgment or questionable character in managing a business that -- but for FCC licensure -- is identical in core objectives and operational particulars to the operation of a broadcast station, that bad judgment and suspect character should speak loudly to the Commission. In fact, it should speak much louder than the direct licensee misconduct in more attenuated contexts, or employees' misconduct in unrelated businesses, that have provoked the FCC to designate hearings or seek to deny license renewals in the past.<sup>6</sup>

Indeed, we would submit that if the judgment and behavior of FOX and its owners are not relevant in this instance, then the Commission's character and public-interest standards are empty vessels indeed.

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<sup>6</sup> See e.g., *Arm & Rage, LLC*, Hearing Designation Order, Order to Show Cause, and Notice of Opportunity for Hearing, MB Docket No. 22-122, DA 22-285, 2022 FCC LEXIS 934 (MB Mar. 21, 2022) (conviction of licensee's owner on tax charges); *RKO General, Inc. (WNAC-TV)*, 78 F.C.C.2d 1 (1980), affirmed on other grounds, *RKO General, Inc., v. FCC*, 675 F.2d 215 (D.C.Cir. 1981) (foreign corrupt practices and antitrust violations by a commonly owned tire company).

Every application for a broadcast license renewal is not only a test for the applicant, but also for the FCC itself. In considering this application, the Commission inevitably will reveal whether it is serious about its regulations, or merely pretending; whether its standards are genuine, or mere shibboleths; whether its regulatory spine is strong, or made of mush.

At the very least, the Commission needs, in this proceeding, to show some curiosity, and some initiative in digging deeper to discover whether the ultimate broadcast license holders have shown themselves through their conduct to be fit or unfit for renewal. At the most, the Commission here has an opportunity to proclaim, backed by solid evidence, that its standards and its dedication to the public interest, convenience, and necessity are alive and real.

Respectfully submitted,

/s/ Ervin S. Duggan  
Ervin S. Duggan

/s/ William Kristol  
William Kristol

cc: Counsel for the parties to LMS File No. 0000213362