

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

In the Matter of	)	
	)	
Applications to Transfer Control of	)	MB Docket No. 19-98
NBI Holdings, LLC, and Cox Enterprises, Inc.,	)	
To Terrier Media Buyer, Inc.	)	

**WRITTEN EX PARTE OF COMMON CAUSE AND UNITED CHURCH OF CHRIST,  
OC INC.**

**I. INTRODUCTION**

Common Cause and United Church of Christ, OC Inc. submit this written *ex parte* letter in response to Terrier Media Buyer, Inc. (“Terrier”), NBI Holdings, LLC, (“NBI”) and Cox Enterprises, Inc. (“Cox”) (collectively, “Applicants”) October 2019 Amendment<sup>1</sup> to its pending applications to transfer control of NBI and Cox to Terrier.<sup>2</sup> The Federal Communications Commission (“FCC” or “Commission”) should reject the Applicants’ October 2019 Amendment. The October 2019 Amendment fails to come into compliance with the Commission’s media ownership rules after the United States Court of Appeals for the Third Circuit’s (“Court”) decision in *Prometheus v. FCC*<sup>3</sup> vacated the agency’s attempt to deregulate the broadcast market. Rather than meaningfully comply with the Commission’s rules, the Applicants disregard

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<sup>1</sup> *Media Bureau Establishes Pleading Cycle for Applications to transfer Control of NBI Holdings, LLC, and Cox Enterprises, Inc., to Terrier Media Buyer, Inc., and Permit-But-Disclose Ex Parte Status for the Proceeding*, MB Docket No. 19-98, Public Notice, DA 19-275 (rel. April 10, 2019); Applications to Transfer Control of NBI Holdings, LLC, and Cox Enterprises, Inc., To Terrier Media Buyer, Inc, October 2019 Amendment (filed Oct. 29, 2019) (“October 2019 Amendment”).

<sup>2</sup> Applications to Transfer Control of NBI Holdings, LLC, and Cox Enterprises, Inc., To Terrier Media Buyer, Inc., Amended Comprehensive Exhibit (filed March. 6, 2019) (“Amended Comprehensive Exhibit”).

<sup>3</sup> *Prometheus Radio Project v. FCC*, 939 F.3d 567 (3rd Cir. 2019) (“*Prometheus*”).

the primary purpose of the rules and seek to take advantage of loopholes resulting from the FCC's own failure to update its rules. Allowing the Applicants' transaction to move forward with the proposed October 2019 Amendment would deliberately ignore the Court's decision and harm the public interest.

## **II. THE APPLICANTS' AMENDMENT DISREGARDS THE PRIMARY PURPOSE OF THE COMMISSION'S MEDIA OWNERSHIP RULES AND TAKES ADVANTAGE OF LOOPHOLES FROM THE COMMISSION'S FAILURE TO UPDATE THE RULES**

The Applicants October 2019 Amendment disregards the primary purpose of the Commission's media ownership rules and seeks to take advantage of loopholes resulting from the FCC's own failure to update its rules. First, the Applicants propose to comply with the Newspaper/Broadcast Cross-Ownership ("NBCO") Rule by reducing the print publication of acquired newspapers to three days a week.<sup>4</sup> This proposal neglects the primary purpose of the NBCO rule – to promote viewpoint diversity at the local level.<sup>5</sup> This is why the Commission has prohibited the combination of newspapers and broadcast stations found within the same market. As the Commission has found, broadcast stations and newspapers remain the dominant sources of local news and information for communities even in today's changing media landscape.<sup>6</sup> Cross-ownership has significant consequences to localism and viewpoint diversity. As demonstrated by the Dayton DMA, Cox's ownership of the Dayton Daily News and WHIO-TV

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<sup>4</sup> See October 2019 Amendment at 2.

<sup>5</sup> See *2014 Quadrennial Regulatory Review- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Second Report and Order, 31 FCC Rcd 9864 para. 129 (2016) ("Second Report and Order").

<sup>6</sup> See *id.* (explaining that "the proliferation of (primarily national) content available from cable and satellite programming networks and from online sources has not altered the enduring reality that traditional media outlets are the principal sources of essential local news and information.").

has led to reporter layoffs and less robust coverage of local news.<sup>7</sup> The Applicants proposal to comply with the NBCO rule simply by reducing the daily publication of acquired newspapers to three days a week does not address the public interest harms of cross-ownership that necessitates the rule in the first place.

The Applicants' October 2019 Amendment also takes advantage of the Commission's failure to meaningfully update the NBCO rule. For the purposes of the NBCO Rule, the Commission defines a daily newspaper as one "which is published four or more days per week, which is in the dominant language in the market, and which is circulated generally in the community of publication."<sup>8</sup> This definition no longer makes sense in today's media marketplace. For example, the NBCO Rule does not distinguish between the print and digital publications of newspapers. Digital newspapers could be updated much more frequently than daily print publications with breaking news stories, investigative reporting, coverage of local sports, weather, and other information communities rely on to make informed decisions. The Applicants October 2019 Amendment remains silent to the status of the digital publications of the acquired newspapers. Nevertheless, the Commission's failure to meaningfully update the NBCO Rule does not mean it should permit the Applicants to exploit this loophole that violates the goal of the NBCO.

Second, the Applicants propose to comply with the reinstated duopoly rule by surrendering a station's license in duopoly markets and transferring its programming to the acquired station in those markets.<sup>9</sup> Again, the Applicants disregard the primary purpose of this rule – to promote

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<sup>7</sup> See Petition to Deny of Common Cause, Common Cause Ohio, and United Church of Christ, OC Inc. MB Docket No. 19-98, at 7 (filed May 10, 2019).

<sup>8</sup> See *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046 (1975).

<sup>9</sup> See October 2019 Amendment at 2.

competition and ownership diversity in the broadcast marketplace.<sup>10</sup> Rather than surrender a station's license in duopoly markets, the Applicants could choose to divest those stations, particularly to women and people of color. The Applicants instead propose to merge the programming of two stations, resulting in less competition and less diversity in those relevant markets contrary to the purpose of the Commission's rule.

### **III. GRANTING THE APPLICANTS' AMENDMENT WOULD DELIBERATELY IGNORE THE COURT'S DECISION**

Granting the Applicants' transaction with the October 2019 Amendment would deliberately ignore the Court's decision in the *Prometheus* case. The Court made clear that the Commission had not adequately considered the impact of changing its media ownership rules would have on ownership diversity.<sup>11</sup> Further, the Court specifically vacated<sup>12</sup> the Commission's *2010/2014 Quadrennial Review Order on Reconsideration*,<sup>13</sup> which eliminated or relaxed several media ownership rules. Therefore, the Commission's NBCO Rule and duopoly rule are in full effect. As explained in the prior section, the Applicants October 2019 Amendment violates the goals of the Commission's reinstated media ownership rules, using technicalities to circumvent compliance with those rules.

For the Commission to approve the Applicants' transaction would ignore the Court's decision. This is part of a troubling pattern. The Commission already turned a blind eye to the Court's ruling when it granted a prior transaction even though it contained media ownership rule

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<sup>10</sup> See *Second Report and Order* para. 17.

<sup>11</sup> *Prometheus Decision* at 32.

<sup>12</sup> *Id.* at 39.

<sup>13</sup> *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules, Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Order on Reconsideration and Notice of Proposed Rulemaking*,

violations.<sup>14</sup> Energy and Commerce Chairman Frank Pallone and Communications and Technology Subcommittee Chair Mike Doyle have specifically sought answers from the Commission on why it chose to ignore the Court’s decision in granting that transaction.<sup>15</sup> The two congressmen noted that the Commission’s actions in that proceeding “undermine the rule of law and the decision of the Third Circuit.”<sup>16</sup> The Commission must pay deference to the Court’s decision and uphold its media ownership rules as they stand. While the Commission may not agree with the Third Circuit’s decision, it is still bound by that decision.

#### IV. CONCLUSION

For the foregoing reasons, Common Cause and United Church of Christ, OC Inc. respectfully request the Commission reject the Applicants’ October 2019 Amendment and deny the Applicants’ proposed transaction.

Respectfully submitted,

*/s/ Yosef Getachew*  
Yosef Getachew  
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805 15<sup>th</sup> St NW  
Washington DC 20005

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<sup>14</sup> *See Application of Red River Broadcast (Assignor) and Gray Television (Assignee)*, Memorandum Opinion and Order, DA 19-943 (Sept. 24, 2019).

<sup>15</sup> *See Attachment A, Letter from Frank Pallone, Chairman, U.S. House Committee on Energy and Commerce, and Mike Doyle, Chairman, U.S. House Subcommittee on Communications and Technology, to Ajit Pai, Chair, FCC (Oct. 22, 2019).*

<sup>16</sup> *Id.* at 1.

*/s/ Cheryl A. Leanza*  
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November 15, 2019

# **ATTACHMENT A**

ONE HUNDRED SIXTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6115

Majority (202) 225-2927  
Minority (202) 225-3641

October 22, 2019

The Honorable Ajit V. Pai  
Chairman  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Dear Chairman Pai:

On September 23, 2019, the United States Court of Appeals for the Third Circuit (Court) rejected the Federal Communications Commission's (FCC) attempt to deregulate the broadcast market by eliminating protections that would prohibit greater consolidation.<sup>1</sup> The Court made clear that the FCC had not adequately considered the effects the elimination of those necessary protections would have on ownership diversity. Despite the clear rebuke, the very next day, the FCC's Media Bureau disregarded the Court's decision and blessed further television consolidation in the Sioux Falls, South Dakota market.<sup>2</sup> Given the Court's ruling, we have concerns about whether the Order violates the FCC's Rules.

As you are aware, Gray Television is the licensee of KSFY-TV, the second-rated station in the Sioux Falls market, and Red River Broadcast Company is the licensee of KDLT-TV, the third-rated station in that market. Prior to the FCC's roll back of the media consolidation protections at issue, this combination would be a clear violation of the "Top Four" rule, which prohibits one entity from owning two of the top four stations in a given market. Now that the roll back has been struck down, the FCC has an obligation to reexamine its media ownership rules.

In allowing this transaction to go forward, the FCC undermines the rule of law and the decision of the Third Circuit. While the FCC acknowledged the Court overturned its attempts at deregulating the broadcast market, it nonetheless reviewed the license transfer as if the Court had

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<sup>1</sup> *Prometheus Radio Project v. FCC*, No. 17-1107 et al., slip op. (3rd Cir. Sept. 23, 2019) (Prometheus Decision).

<sup>2</sup> *Application of Red River Broadcast (Assignor) and Gray Television Licensee, LLC (Assignee)*, Memorandum Opinion and Order, DA 19-943 (Sept. 24, 2019).



not struck down its roll back of media protections. The FCC argued that it does not have to comply with the Court's decision because, while the Court issued its decision, the Court's mandate has not yet been issued. The FCC's technical arguments about why it does not have to comply with the Court's decision seem highly suspect, at best, and an intentional flouting of the rule of law at worst.

In light of the FCC's ignoring of the Court's decision and this Committee's commitment to ensuring a diverse marketplace, we seek answers to the questions below.

1. Will the FCC reconsider Gray Television's acquisition of KDLT-TV once the Court's mandate has been issued?
2. Did the FCC seek the opinion of the Court, or the Office of General Counsel, regarding the legality of relying on the FCC rules that have been struck down by the *Prometheus Radio Project v. FCC* Decision? If so, please provide all written communications to that effect in the FCC's possession.
3. Is the FCC currently reviewing transactions that are seeking waivers of the broadcast ownership rules? If so, please provide the Committee the details of those transactions.
4. Is the FCC currently reviewing transactions that would require a waiver to comply with the broadcast ownership rules in place either prior to or after the *Prometheus Radio Project v. FCC* Decision? If so, please provide the Committee the details of those transactions.

We appreciate your attention to this important matter. Please provide your responses to the questions above by November 12, 2019. Should you have any questions, please contact Gerald Leverich of the Committee staff at (202) 225-3641.

Sincerely,



Frank Pallone, Jr.  
Chairman



Mike Doyle  
Chairman  
Subcommittee on Communications  
and Technology

## CERTIFICATE OF SERVICE

I, Yosef Getachew, hereby certify that on the 15<sup>th</sup> day of November, 2019, I caused a true and correct copy of the foregoing *ex parte* letter via email to the following:

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*/s Yosef Getachew*  
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