Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the matter of	)	
	)	
Applications for Consent to the	)	MB Docket No. 07-119
Transfer of Control of the Tribune Company	)	
	)	
	)	

OPPOSITION TO PETITION TO DENY AND REPLY TO COMMENTS

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June 26, 2007

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SUMMARY

The Applications in this proceeding seek FCC consent to the transfer of control of the licenses held by the Tribune Company and its subsidiaries from the current shareholders of Tribune to Samuel Zell, EGI-TRB, L.L.C., and the Tribune Employee Stock Ownership Plan as Implemented Through the Tribune Employee Stock Ownership Trust (the "ESOP"). Despite the size of the transaction and the length of the filings submitted to the Commission, this is in actuality a very easy and straightforward case, one in which approval of the temporary cross-ownership waivers to which UCC, Media Alliance, and other challengers primarily object will yield manifest public interest benefits. The case is complicated only by the challengers' desire for a different buyer, an evaluation the FCC is flatly barred by statute from making. The need for prompt FCC approval is supported by the facts, the law, and sound public policy.

Nowhere in their Petition do UCC and Media Alliance demonstrate that grant of the Applications would cause them or any other person harm that would be redressed by the relief they seek -- denial of the Applications. Petitioners therefore do not satisfy the bedrock requirements for standing established by Supreme Court and other appellate precedent, and their Petition should be dismissed. Even if this infirmity were overlooked, the Petition fatally omits declarations from residents in all of the markets at issue in its substantive challenges to the temporary cross-ownership waivers. As a result, the FCC may not consider the majority of these challenges.

Absolutely no doubt exists in this case as to the qualifications of either the Transferor or Transferees to serve as Commission licensees, and none has been raised. The UCC/MA Petition's attempt to claim that the Applications cannot be granted due to the pendency of certain Tribune license renewal applications misinterprets basic statutory and regulatory principles and

Commission precedent; it should be disregarded. Similarly, the suggestions raised by the UCC/MA Petition and the Teamsters Comments that the Commission should consider alternative purchasers or changes to the structure of the proposed transaction are flatly foreclosed by the Communications Act and principles of comity.

As detailed herein, as well as in Tribune's opposition filed today and in the Applications themselves, the temporary waivers of the newspaper/broadcast cross-ownership rule requested in five markets are fully supported by the facts, the law, and public policy. The Commission should reject the UCC/MA Petition's attempt to severely limit the geographic market definition and the absurd restrictions it would place on the outlets that may be considered in any diversity analysis. The Teamsters Comments, which urge the Commission to consider supposed diversity and localism benefits conjured from its speculation about alternative post-transfer ownership structures, should likewise be disregarded as legally irrelevant and misguided.

At the end of the day, despite their long-windedness, the challengers have set forth no credible or sustainable reason to delay or deny the proposed transfer of control and its five temporary cross-ownership waivers and the single duopoly waiver. The Communications Act itself disposes of essentially all of their objections. In such a clear-cut and narrowly focused case, the Commission should move promptly to approve the proposed transaction.

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Samuel Zell, the Tribune Employee Stock Ownership Plan as Implemented through the Tribune Employee Stock Ownership Trust (the "ESOP"), and EGI-TRB, L.L.C. (collectively, the "Transferees"), by their attorneys, hereby oppose the Petition to Deny the applications (the "Applications") seeking consent to the transfer of control of the Tribune Company ("Tribune") from its current shareholders ("Transferor") to the Transferees, which was filed by the Office of Communications of the United Church of Christ, Inc. ("UCC") and Media Alliance (the "UCC/MA Petition") in the above-referenced proceeding. The Transferees also hereby Reply to the Comments of the International Brotherhood of Teamsters (the "Teamsters Comments"), which do not oppose the grant of the Applications.

I. Introduction

Despite the size of the transaction and the voluminous nature of the Applications, the challengers' filings, and the very strong response of Tribune which is being separately filed today, this is an incredibly easy case warranting prompt disposition.

First, this is not a situation in which any doubt exists about the qualifications of either the Transferor or the Transferees. Neither party suffers from any question regarding its statutory *bona fides*, as a current or potential licensee. Neither has been or is the subject of any past,

current, or pending FCC investigatory or adjudicatory proceeding that would call its qualifications into doubt. No one contends otherwise. Petitioners' attempt to contort the pendency of certain Tribune license renewals into a claim that transfer applications concerning them cannot be granted misinterprets basic statutory and regulatory principles. Their suggestions that the FCC consider alternative purchasers also ignore basic statutory language.

Second, the five temporary cross-ownership waivers and single duopoly waiver are fully supported by the facts, the law, and public policy. On the facts, the Applications set forth in great detail the competitive forces and diverse sources that exist in each of the five markets. Challengers are mistaken in their attempt to limit the FCC's consideration of relevant facts by defining the geographic markets more narrowly than precedent dictates and by excluding multiple categories of outlets -- such as non-English language stations, non-news formatted radio stations, and weekly newspapers, which bring greater depth and context to the content residents of each market receive. On the law, the requested waivers fall squarely within the types of temporary exceptions the FCC envisioned would be warranted when it addressed the issue in its *Notice of Inquiry* in the 1998 Biennial Regulatory Review.[1] Not only do the requested temporary waivers fit that template, but they are consistent with waivers the FCC has issued since it enunciated that standard. As a matter of public policy, the residents of the communities Tribune currently serves will continue to receive exceptional and uninterrupted service from the new owners; the board of directors of Tribune has already determined this transaction is in the best interest of the public shareholders; and the employee participants in the ESOP will become 100 percent, and clearly majority, owners. The Teamsters Comments focus on these ESOP

[1] *1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry,* 13 FCC Rcd 11276, 11294-95 (1998).

ownership issues and, to the extent they suggest changes, are beyond the scope of the Commission's authority.

Moreover, full bipartisan support in Congress exists for prompt action on the Applications. This support recognizes that prompt FCC action is clearly in the public interest.[2]

Equally significant, approval of the Applications will result in no harm. Given the temporary nature of the waivers, even the challengers who may favor more restrictive cross-ownership standards than the media industry is willing to accept will not be prejudiced, nor will those who have opposed Tribune's pending renewal applications suffer in any way because the Transferees are fully committed to "stepping into the shoes" of the current renewal applicants. In fact, a basic question exists whether the UCC/MA Petition satisfies standing requirements in all markets and certainly in markets outside New York and Miami.

Given these simple and clear-cut truths, the Commission should move swiftly to dismiss the UCC/MA Petition and other objections and grant the Applications. As shown below and in the Tribune opposition being filed today, this is an easy case which warrants prompt disposition.[3]

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[2] *See* Letter to the Honorable Kevin J. Martin from Senators Richard J. Durbin, Harry Reid, and Charles E. Schumer, dated June 15, 2007; Letter to the Honorable Kevin J. Martin from Senator Richard Durbin and Representatives Rahm Emanuel, Dennis Hastert, Melissa Bean, Judy Biggert, Phil Hare, Timothy Johnson, Mark Kirk, Ray LaHood, Donald Manzullo, Bobby Rush, Peter Roskam, John Shimkus, and Jerry Weller, dated May 18, 2007.

[3] The Transferees also state their support for the Opposition of Tribune Company to the UCC/MA Petition that is being filed today. Tribune's Opposition identifies numerous additional shortcomings in the UCC/MA Petition and once again demonstrates, with extensive factual and legal support, that grant of the Applications would serve the public interest and represent sound public policy. In contrast, the letter submitted by Free Press, Consumers Union, and the Consumer Federation of America offers no legal support for its conclusory statements that grant of the Applications would violate the newspaper/broadcast cross-ownership rule and should be given no consideration.

II. The UCC/Media Alliance Petition Should Be Dismissed on Standing Grounds

As a threshold matter, it is highly questionable whether petitioners have alleged any injury that would be redressed by the relief that they seek. As a result, they have failed to qualify as petitioners under basic standing principles. In addition, even if their alleged injury were presumed to exist and were redressable by the relief they seek (denial of the Applications), both UCC and Media Alliance, as shown below, have failed to supply declarations from residents of all Tribune cross-ownership markets as required to satisfy even the most lenient interpretation of "audience standing."

Under Section 309(d) of the Communications Act, only a "party in interest" may file a petition to deny an application to transfer control of a television station licensee.[4] To establish standing, a petitioner must demonstrate (1) concrete and particularized injury-in-fact, (2) a causal connection between the injury and the conduct complained of, and (3) a substantial likelihood that the requested relief will redress the asserted injury.[5]

UCC and Media Alliance claim that they and their members will be harmed "by the loss of diversity that would result if the FCC permitted Tribune to continue to commonly own TV stations and the daily newspaper in the same area."[6] Even presuming that an alleged loss of diversity constitutes a cognizable "injury," denial of the Applications, as challengers have requested, would not redress this harm. Under precedent from the Supreme Court and the United

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[4] 47 U.S.C. § 309(d) (2000).

[5] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Rainbow/PUSH Coalition v. FCC*, 396 F.3d 1235, 1240 (D.C. Cir. 2005) (rejecting concept of automatic audience standing and requiring satisfaction of "irreducible constitutional minimum of standing" set forth in *Lujan*). The FCC, on numerous occasions, has recognized the applicability of the *Lujan* standard in Section 309(d) cases. *E.g. Timothy K. Brady, Esq., et. al.*, 20 FCC Rcd 11987, 11990 (Med. Bur., Audio Div. 2005); *MCI Communications Corp.*, 12 FCC Rcd 7790, 7794 (1997).

[6] UCC/MA Petition at 4.

States Court of Appeals for the District of Columbia Circuit, a petitioner, in order to show an injury is redressable, must demonstrate that denial of the applications at issue would somehow lead to a different result than would grant of those applications and thereby redress the alleged harm.[7]

If the Commission were to deny the Applications, the existing cross-owned newspaper/broadcast combinations would continue. Tribune would hold these cross-ownerships pending either action on its license renewal applications and/or conclusion of the Commission's media ownership rulemaking. In Chicago, Tribune would continue to hold this combination indefinitely. In none of the markets would diversity in any way increase if the Applications were denied, and their denial would not redress the alleged harm to diversity claimed by UCC and Media Alliance. As a result, UCC and Media Alliance lack standing to challenge the Applications, and their petition should be dismissed.

Even if the Commission found injury and redressability in this case, the challengers still have failed to qualify as "parties in interest" with respect to most of the Applications they attack even under lenient interpretations of "audience standing."[8] To support standing as petitioners, an

[7] *See Lujan*, 504 U.S. at 568-571; *Jaramillo v. FCC*, 162 F.3d 675, 677 (1998) (refusing to find standing to challenge an assignment application when "the outcome [of grant] is exactly the same as would eventuate if the Commission held up the assignment").

[8] UCC and Media Alliance do not attempt to claim standing in their own right but rather assert standing as associations representing the interests of their members. UCC/MA Petition at 3-4. Under the doctrine of associational standing, an association or group may maintain a suit to redress injuries to its members only if it demonstrates by the submission of declarations or affidavits that it satisfies the "threshold requirement" that "at least one of its members would have standing to sue in his own right." *Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003) ("*Rainbow/PUSH 2003*"). *See KLUV(FM)*, 10 FCC Rcd 4517 (MMB 1995) (quoting *North Alabama Broadcasters, Inc.*, 74 FCC 2d 347, 348 (1979)).

association's members must assert residence in the relevant market and regular viewing of or listening to the broadcast station at issue.[9] In this case,

(a) Media Alliance submits a single declaration from a member identified as a resident of Oakland, California but does not submit a declaration or affidavit from a resident of the service area of *any* Tribune station.[10]

(b) UCC submits affidavits from members identified as residents of Coral Gables, Florida; Centerport and East Rockaway, New York; and Cleveland, Ohio.[11] UCC has not, however, submitted any affidavit or declaration from a member claiming to be a regular viewer or listener who resides in the service area of any Tribune station in markets other than Miami or New York City.[12]

Given the failure to satisfy the most basic requisites of standing, the UCC/MA Petition should be dismissed. At a minimum, Media Alliance should be dismissed completely as a petitioner given the lack of any local declarant, and UCC's challenges should be dismissed with respect to the Applications concerning stations in all of Tribune's existing media markets other than New York City and Miami. Only with respect to the New York and Miami markets may the FCC even proceed to consider petitioners' allegations.

III. The UCC/Media Alliance Petition Is Riddled with Substantive Flaws, Inaccurately Claiming Tribune Has No Authorizations To Transfer, Mistakenly Suggesting the FCC Should Consider Alternative Purchasers, and Wrongly Proposing an Extremely Narrow Approach to the Evaluation of Market Diversity

As shown below and as Tribune's opposition being filed today addresses in greater detail, the UCC/MA Petition suffers from numerous substantive flaws. As a matter of law, the Petition claims that Tribune has no authorizations to transfer in the Los Angeles, Hartford, and New York markets given the pendency of its license renewal applications, an argument that ignores

[9] *See, e.g., Rainbow/PUSH 2003*, 330 F.3d at 543-544.

[10] Attachment E to UCC/MA Petition.

[11] Attachments A-D to UCC/MA Petition.

[12] Transferees assume that petitioners are not objecting to transfer of control of any of the licensees for stations outside the five cross-ownership markets since they fail to supply any declarations from residents of those markets.

bedrock statutory and regulatory standards; its attempt to elevate the issue to a qualifications concern similarly lacks any basis in law or fact. In like fashion, its request that the FCC speculate about or measure the Transferees against alternative purchasers is discredited by basic language in the Communications Act. Finally, its attempt to narrow FCC consideration of the requested temporary cross-ownership waivers to a partial slice of each market and a truncated list of each market's outlets ignores both recent FCC and court affirmation of an economic approach to market analysis and the very essence of what "diversity" means.

A. The UCC/Media Alliance Petition's Claim That Tribune Has No Authorizations To Transfer in Los Angeles, Hartford, and New York Is Based on a Fundamental Misinterpretation of the Communications Act

The UCC/MA Petition alleges that Tribune does not legally hold authorizations for KTLA(TV), Los Angeles, California; WTIC-TV, Hartford, Connecticut; WTXX(TV), Waterbury, Connecticut; or WPIX(TV), New York, New York, because Tribune's license renewal applications for those stations remain pending beyond the expiration date of the licenses, and the terms of the cross-ownership rule bar any further dispositions given this alleged "expiration."[13] This assertion fundamentally misreads the Communications Act, the Commission's rules, and the case law.

Section 307(c) of the Communications Act and Section 1.62 of the Commission's rules both provide that when an application to renew a broadcast license remains pending with the Commission, that license continues in effect until the Commission takes final action on the application.[14] As the Commission's records indisputably show, Tribune has filed timely applications to renew the licenses of each of its television and radio stations and, petitioners'

[13] UCC/MA Petition at 15, *citing Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964); *G.A. Richards*, 14 FCC 2d 429, 430 (1950).

[14] 47 U.S.C. § 307(c) (2000); 47 C.F.R. § 1.62 (2006).

claims to the contrary notwithstanding, has included appropriate requests for waiver of the cross-ownership rule under Section 73.3566 of the Commission's rules.[15]

Rather than discuss, or even mention, these provisions of the Communications Act and the Commission's rules, the UCC/MA Petition bootstraps its concerns into a "qualifications" argument, contending "a licensee which has become unqualified to operate a broadcast station has nothing to transfer or assign."[16] Petitioners fail to note, however, that even the authority they cite requires a *finding* by the Commission that a licensee is unqualified to hold the authorization at issue. At no time has the FCC found that Tribune and its current shareholders are unqualified to hold FCC licenses. The mere existence of the petitioners' challenges to Tribune's pending renewal applications does not in any way equate to a finding by the Commission regarding the licensees' basic qualifications, particularly since those renewal objections have not challenged Tribune's basic qualifications to remain a Commission licensee but have only questioned the cross-ownership waivers included in the renewal applications. As mandated by the Communications Act and the FCC's rules, Tribune's licenses continue in effect until the Commission takes final action on its applications for renewal of those licenses.

Absent concerns over the basic qualifications of parties to a transaction, the Commission has repeatedly recognized that it may grant a transfer application despite the pendency of renewal applications for some of the licenses involved in a multi-station transaction.[17] As required by the procedures set forth in this precedent, the Transferees have explicitly agreed to succeed to the position of the Transferor in any and all pending license renewal applications.[18]

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[15] 47 C.F.R. § 73.3566 (2006).

[16] UCC/MA Petition at 15.

[17] *Shareholders of CBS Corporation*, 16 FCC Rcd 16072, 16072-73 (2001).

[18] *See* Exhibit 13B to the Applications.

The UCC/MA Petition's claim that the pendency of certain Tribune renewals requires that the Applications be dismissed is simply wrong.

B. Speculation Regarding Other Potential Transferees or Transactions Is Legally Irrelevant

The UCC/MA Petition also urges the Commission to deny the Applications based on speculation regarding Tribune's alleged failure to enter into other possible transactions or to sell part or all of Tribune to some entity besides the Transferees.[19] In a similar manner, the Teamsters Comments urge the Commission to consider other ways in which the proposed transaction could have been structured to better suit its own interests.[20]

The FCC's lack of legal authority to engage in such speculation could not be clearer. Section 310(d) of the Communications Act provides that in acting on an application for transfer or assignment of Commission authorizations

> any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission *may not consider* whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.[21]

As representatives of the public shareholders of Tribune, the company's board exercised its fiduciary duty to those shareholders by selecting Transferees and proposing the transaction set forth in the Applications. The Commission's review of the Applications is limited to a determination whether transfer of control to those parties would serve the public interest; it may not include speculation regarding the potential benefits of transfer

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[19] UCC/MA Petition at 23-25.

[20] Teamsters Comments at 6-7.

[21] 47 U.S.C. §310(d) (2000) (emphasis added). *See also Plough Broadcasting Company*, 70 FCC 2d 683, 693 (1978) (refusing to consider argument that an assignment to a different party might have increased minority ownership).

or assignment to other entities. Any speculation as to the merits of other possible purchasers is conclusively barred as a matter of law.

C. The UCC/Media Alliance Petition Proposes a Fatally Flawed and Absurdly Narrow Market Definition

The UCC/MA Petition, in a misguided effort to show that the large markets in which the Applications seek temporary waiver of the cross-ownership rule are not diverse, urges the FCC to utilize an illogical and unrealistically narrow geographic definition of those markets.[22] First, contrary to Commission precedent, the UCC/MA Petition argues that the relevant geographic market should include only the area in which each television station's Grade A contour overlaps the area "served by" the commonly-owned newspaper, rather than including the full Designated Market Area ("DMA") to which the station is assigned.[23] Second, the UCC/MA Petition compounds this error by suggesting that the FCC disregard numerous local outlets in each market. For instance, it claims that foreign language stations, stations not exclusively devoted to news, and weekly newspapers make no contribution to diversity and must be excluded, turning the entire concept of diversity on its head.[24]

1. The DMA Is the Appropriate Geographic Market Definition for Analysis of the Requested Temporary Cross-Ownership Rule Waivers

In its evaluation of each of the Applications' temporary cross-ownership waiver requests, the Commission should consider the relevant geographic market to be the television station's DMA, rather than the unreasonably narrow "overlap area" proposed by UCC and Media Alliance. Use of this proposed "overlap" method would unrealistically limit the scope of analysis to only the area served by the newspaper that lies within the station's Grade A contour.

[22] UCC/MA Petition at 25-26.

[23] *See* UCC/MA Petition at 25-26, 32-33, 40-41, 47-48, 53-54.

[24] *E.g.*, UCC/MA Petition at 26-29, 34-36, 41-42, 49, 55.

As support for its narrow market definition, the UCC/MA Petition cites two *radio* cases, *Hopkins Hall* and *Columbia Montour*.[25] Unlike the Applications, both of those cases involved cross-ownership of a newspaper and a small, rural radio station far from the principal city of the station's Area of Dominant Influence ("ADI"), as established by Arbitron.[26] In *Hopkins Hall*, the Commission specifically noted that defining the geographic market using the ADI in that case was inappropriate because the ADI "relate[d] to television stations."[27] Moreover, and as more fully demonstrated in the Tribune opposition being filed today, the stations at issue in each of the requested temporary cross-ownership waivers reach significantly larger areas than did those analyzed in *Hopkins Hall* and *Columbia Montour* and serve not only the heart but extensive outlying portions of their DMAs. Nothing in *Hopkins Hall* and *Columbia Montour*, other Commission precedent, or anything else in the UCC/MA Petition, suggests that the Commission should take a similarly narrow approach in this case. Indeed, in the context of newspaper/television cross-ownership, the FCC has repeatedly relied on the DMA or ADI as the appropriate geographic measure of a market.[28]

In a number of related areas, the Commission has also recognized that the use of commercially and economically-based market definitions makes better policy sense and more

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[25] *See, e.g.*, UCC/MA Petition at 25-26, *citing Hopkins Hall Broadcasting, Inc.*, 10 FCC Rcd 9764 (1995), and *Columbia Montour Broadcasting, Inc.*, 13 FCC Rcd 13007 (1998).

[26] At the time of the *Hopkins Hall* analysis, the Commission had access to market data provided by Arbitron, which measured television markets using ADIs. Arbitron has since ceased providing television market information; similar information is now available from Nielsen Media Research, which uses the DMA as its unit of market measurement.

[27] *Hopkins Hall*, 10 FCC Rcd at 9766.

[28] *Counterpoint Communications, Inc.*, 20 FCC Rcd 8582, 8585-8586 (2005) (granting temporary waiver after analysis of DMA-wide information to assess market conditions); *UTV of San Francisco*, 16 FCC Rcd 14975, 14988-14989 (2001) (relying on the "diverse nature" of the New York market as based on an analysis of DMA-wide measures); *Metromedia Radio & TV*, 102 FCC 2d 1334, 1349-1350 (1985) (measuring diversity in the Chicago and New York markets including "surrounding areas.").

realistically portrays competitiveness in markets, than does reliance on contour-based definitions. In the late 1990s, for example, the Commission modified its television duopoly rule to utilize the DMA as a geographic market definition, recognizing that "DMAs are a better measure of actual television viewing patterns," and that they "more accurately define a local television market" than do contour-based methods.[29] More recently, when it revised its radio ownership rules in 2003, the Commission determined that the commercially-available Arbitron "Radio Metro Markets" presented a "more rational" basis for defining radio markets than did the previous contour overlap methodology.[30] The United States Court of Appeals for the Third Circuit upheld this approach in *Prometheus*, which is now in effect pursuant to that court's partial lifting of its stay of the *2003 Report and Order*.[31]

The use of the DMA as the geographic market definition for analysis of the temporary cross-ownership waivers proposed in the Applications is similarly more appropriate and more accurately reflects the economic realities in the markets. Use of the more narrow "overlap area" method would ignore the Commission's evolving and court-approved reliance on commercially-

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[29] *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, Report and Order*, 14 FCC Rcd 12903, 12926 (1999), *order on reconsideration*, 16 FCC Rcd 1067 (2001), *rev'd and remanded*, *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

[30] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers , Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area, Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, 13724 (2003) (*"2003 Report and Order"), aff'd and remanded sub nom., Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("*Prometheus*"), *cert. denied, Media General, Inc. v. FCC*, 545 U.S. 1123 (2005).

[31] *Prometheus Radio Project v. FCC*, No. 03-3388 (3d Cir. Sept. 3, 2004) (*order* modifying stay granted in *Prometheus*); *see also Prometheus*, 373 F.3d at 423.

recognized market definitions and produce an artificially narrow measure of current diversity in the markets at issue.

2. Removal of Foreign-Language, Other "Non-News" Stations, and Weekly Newspapers from a Diversity Analysis Would Illogically Restrict the Market in a Manner Contrary to the Nature of Diversity Itself

In addition to an unreasonably narrow geographic market definition, the UCC/MA Petition urges the Commission to analyze diversity in a market by excluding several significant types of outlets -- Spanish-language broadcast stations, broadcast stations that do not provide local news (all news formats, in the case of radio), and weekly newspapers. First, considering only English-language television and radio stations would result in an absurdly narrow definition of diversity, particularly in the markets at issue in the requested temporary cross-ownership waivers. The sole authority UCC and Media Alliance cite for such exclusion is an allotment decision related to the de-reservation of a noncommercial educational television station.[32] Although the Commission in that decision did recognize that differences existed between Spanish and English-language programming, it in no way suggested that Spanish-language stations do not contribute to diversity. In fact, the Commission's grant in that case of an extraordinary waiver of its noncommercial reservation policy was premised on the conclusion that addition of Spanish-language programming to the Phoenix market would "increase and strengthen program diversity and thereby provide multiple viewing choices in the community."[33] In attempting to show that some of the largest markets in the country are somehow not diverse,

[32] UCC/MA Petition at 26-28, *citing Amendment of the Television Table of Allotments to Delete Noncommercial Reservation of Channel *39, Memorandum Opinion and Order* ("*Channel *39*"), 20 FCC Rcd 16854 (2005).

[33] *Channel *39,* 20 FCC Rcd at 16860.

UCC and Media Alliance would have the Commission take an illogical and absurd approach, directly contrary to the broad inclusiveness that diversity is meant to foster.

In further trying to dispel the true diversity of the nation's largest markets, UCC and Media Alliance claim that only television and radio stations providing local news contribute to diversity, and all others should be disregarded by the FCC.[34] They take the analysis one step further with respect to radio by arguing that only radio stations with news formats should count towards diversity in a market.[35] This approach would exclude the numerous "talk radio" stations that have sprung up since repeal of the Fairness Doctrine and the more recent crop of sports-format stations -- both of which truly bring diverse information, news, and entertainment to the residents of their service areas. The UCC/MA Petition lacks any Commission authority for this exclusionary proposition, which would make a mockery of the concept of diversity.

The UCC/MA Petition also claims that weekly newspapers should not be considered when evaluating diversity in the Chicago and Miami markets because the FCC did not make the cross-ownership rule apply to weekly newspaper owners when it adopted the rule in 1975.[36] As the UCC/MA Petition notes, at that time weekly newspapers were "a relatively unimportant fraction of the media mix in a particular area," especially when compared to the then much more dominant market share held by daily newspapers.[37] That factual premise has changed radically

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[34] *E.g.*, UCC/MA Petition at 34-35.

[35] *E.g.*, UCC/MA Petition at 28.

[36] UCC/MA Petition at 29, 36, *citing Amendment of Sections 73.34* [sic], *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, 1075 (1975) (the quotation cited by the UCC/MA Petition appears on page 1075 of the *Second Report and Order* rather than page 1072 as cited in the Petition.) The UCC/MA Petition does not appear to challenge the contributions that weekly newspapers make to diversity in the Hartford, New York, and Los Angeles markets.

[37] *Id.*

since 1975, as the number and circulation of daily newspapers have decreased, while weekly newspapers have emerged as significant sources of highly localized news and information.[38] Even if the factual change is overlooked, the UCC/MA Petition misses the mark; the FCC's determination that certain outlets are inappropriate for inclusion in ownership limitations does not mean they warrant exclusion in any analysis of diversity in that market. Noncommercial stations, for instance, are not subject to the ownership limitations in Section 73.3555, yet no one would contend that they do not contribute to a market's diversity. As demonstrated in detail in the Applications and in Tribune's opposition being filed today, under any reasonable definition, the markets in which the Transferees have requested temporary cross-ownership waivers are extraordinarily diverse.

IV. Allegations in the Teamsters Comments That Tribune Should Have Structured the Transaction Differently Are Legally Irrelevant and Misguided

Both the UCC/MA Petition and the Teamsters Comments argue that assignment or transfer of Tribune's broadcast licensees to entities other than the Transferees would have better served the public interest.[39] In particular, the Teamsters Comments urge the Commission to consider whether an alternative structuring of the post-transfer ownership and control of Tribune might have resulted in different public interest benefits. As discussed above, however, the Communications Act flatly prohibits the Commission from engaging in speculation as to the public interest implications of different proposals.[40]

The Teamsters Comments also express concern that the employees of Tribune, who will become the 100 percent equity owners of the company through the ESOP, are being granted only

[38] *See, e.g.*, Comments of the Newspaper Association of America, MM Docket Nos. 01-235 and 96-197, filed Dec. 3 2001 at 14 & Appendix I, Section I.

[39] UCC/MA Petition at 23-25; Teamsters Comments at 6-7.

[40] *See supra*, § III.B.

equity interests and are not also being given a "voice" in the governance of Tribune.[41] Not only is this concern an improper basis for Commission consideration, but it is in fact misplaced.[42] Upon consummation of the transactions detailed in the Applications, the ESOP will hold 100 percent of the equity ownership of Tribune, without any requirement that the participants in the ESOP make a financial investment of any sort.[43] Although Tribune will also issue a subordinated note and warrants for up to 43 percent of the new stock of the company to EGI-TRB, L.L.C., the ESOP will in no case own less than a controlling stake in the company and will continue to be the 100 percent owner until the warrant is exercised and the stock is purchased by EGI-TRB, L.L.C.[44]

Contrary to assertions in the Teamsters' Comments, under the proposed structure, the employee participants in the ESOP will be not only the majority shareholders of Tribune but will also be the holders of pass-through voting rights on specified major matters affecting Tribune, such as any sale of all or substantially all of Tribune's assets, mergers, and recapitalizations. These rights are included in the ESOP governing documents.[45] Moreover, the trustee of the ESOP, which holds legal title to and votes the stock, does so solely for the benefit of the

[41] Teamsters Comments at 2.

[42] The Transferees also note that the Teamsters Comments' assertion that "Samuel Zell" is listed as the sole transferee in the Applications is simply mistaken. Teamsters Comments at 4. In actuality, each Application lists three transferees: Mr. Zell, the Tribune Employee Stock Ownership Plan as Implemented Through the Tribune Employee Stock Ownership Trust, and EGI-TRB, L.L.C. (*See* each FCC Form 315 at Section IV, Question 2 and Exhibit 11).

[43] *See* Exhibit 14 to the Applications at 1.

[44] *See* Exhibit 14 to the Applications at 1.

[45] *See* Tribune Employee Stock Ownership Plan at Section 13, submitted as part of Exhibit 6 to the Applications. *See also, e.g.*, Employee Retirement Income Security Act of 1974, as amended ("ERISA"), § 403, 404, *as codified at* 29 U.S.C. §§ 1103, 1104 (2000); Internal Revenue Code, § 409, *as codified at* 26 U.S.C. § 409 (2000).

employee participants.[46] The trustee owes its fiduciary duty solely to the employee participants in the ESOP Plan and has no fiduciary responsibility to Tribune itself. Indeed, in some instances the trustee may be required to seek opportunities for the sale of stock over the objection of Tribune or its board of directors. Asserting that the employee owners of Tribune will have "no voice" in the governance of the company is simply incorrect. The voice given to the employees through the ESOP is entirely consistent with ERISA provisions, additional tax-related statutes and regulations, and other employee stock ownership plans.

The Teamsters Comments urge the Commission to examine whether restructuring the ESOP might better serve the public interest. As shown above in Section III.B., not only is such review disallowed by the Communications Act, but case law establishing long-recognized principles of comity requires the Commission to refrain from that exercise. While the Commission undeniably has an independent duty to protect the public interest, comity principles direct it to exercise its authority in a manner consistent with the public interest goals and policies of other federal statutes, agencies, and regulations.[47]

[46] *See* Tribune Employee Stock Ownership Plan at Section 13, submitted as part of Exhibit 6 to the Applications. The proposed arrangement is also consistent with the control by trustees of stock in Commission licensees that have been held for the benefit of other entities or individuals, arrangements which the Commission has traditionally found acceptable. *See, e.g., In re Applications of Arthur B. McBride, Jr., Memorandum Opinion and Order*, 14 FCC Rcd 13551 (Med. Bur. 1999) (granting waiver of one-to-a-market rule to allow transfer of control of licenses from parent to trust established for benefit of his children).

[47] *See, e.g., La Rose v. FCC*, 494 F.2d 1145 (1974) (reconciling Commission's duty to protect the public interest with public interest provisions of bankruptcy law). *See also Adelphia Communications Corporation*, 17 FCC Rcd 24544, 24546, n.9 (2002) ("The Commission has recognized that, under its public interest mandate, it has an obligation to consider the national policy underlying other federal laws.")

In the instant case, ERISA and other tax-related statutes recognize the public interest benefits available from the creation of equity for employees through employee stock ownership plans, including those structured just like the Tribune ESOP. The Commission cannot second-guess those policies and should reject the Teamsters Comments' invitation to speculate about alternative ESOP formulations.

Although the employee owners of Tribune may not determine the day-to-day operations of Tribune, this arrangement is consistent with other employee stock ownership plans, which are designed primarily to provide employees with the economic benefits of stock ownership. It also does not differ substantially from the operational control rights afforded to the equity owners of a publicly traded company, who generally do not direct the routine operations of such companies. Indeed, the suggestion in the Teamsters Comments that granting additional voting rights to the employee owners of the company would necessarily benefit localism and programming diversity is simply naive. As is the case with most publicly traded companies, detailed daily operational and programming decisions of Tribune will continue to be made by the company's board of directors and its officers, not by shareholder vote.

The Teamsters Comments also do not point to a single case involving a transfer of control in which the Commission has assessed a hypothetical correlation between diversity of owners within a broadcast entity, on the one hand, and diversity of programming or viewpoints and localism, on the other. Such an inquiry, and the inquiry that the Teamsters urge here, would stand as an insurmountable impediment to transfers of control; the Commission and affected parties would become hopelessly bogged down in the speculative exercise of quibbling about whether particular hypothetical ownership structures and voting arrangements would somehow advance public interest goals.

Prior to the current auction regime for awarding *new* licenses, the FCC gave applicants comparative credit for "integration," that is the extent to which owners were proposing to be involved in the licensee's day-to-day management. As the United States Court of Appeals for the District of Columbia Circuit recognized, however, the FCC's assumption of service-related benefits that would flow from these arrangements was so speculative and so lacking in evidentiary support as to be arbitrary and capricious.[48] The Teamsters Comments in essence ask the FCC to harken back to an "integration" analysis because they speculate, as the FCC did, that public interest benefits would flow from such an approach.

Although the Teamsters Comments may wish that Tribune had chosen to structure its reorganization in a different manner, they have not suggested that the structure of the transaction proposed in the Applications violates any law or Commission policy, and, in fact, the Teamsters Comments do not urge the Commission to deny the Applications. As required by the Communications Act, the Commission should consider only the applicants and the transaction before it and should refuse to engage in unsupported speculation as to the merits of other potential transactions or deal structures, particularly when the applicants and transaction before the Commission effectuate principles embodied in other non-communications related statutes.

V. Conclusion

This is a very easy and straightforward case. It is complicated only by challengers' desire to rewrite communications law. Even if challengers' standing problems are overlooked, their substantive objections to the Applications and the requested temporary cross-ownership waivers must fail. All parties are qualified under the Communications Act, FCC precedent, and FCC regulations to effectuate the transaction. Tribune's pending renewals do not in any way bar grant

[48] *Bechtel v. FCC*, 10 F.3d 875, 878-887 (D.C. Cir. 1993).

of the Applications. Speculation about alternative purchasers is legally irrelevant. Challengers' attacks on the diversity existent in the five cross-ownership markets are barred by FCC policy and precedent, not to mention negated by common sense. The structure of the Transferees is consistent with codified tax and employee benefits standards, which the FCC must recognize as a matter of comity. Nothing in the challengers' contentions should stand in the way of prompt FCC approval of the Applications and issuance of the five temporary cross-ownership waivers and the duopoly waiver they request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tammi Foxwell, a secretary at the law firm of Dow Lohnes PLLC, hereby certify that on this 26th day of June 2007, I caused a copy of the foregoing "Opposition to Petition to Deny and Reply to Comments" to be served via first-class mail, postage prepaid, upon the following:

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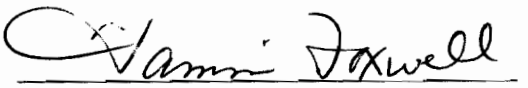

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