

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

In the Matter of)
)
Applications for Consent to the) MB Docket 07-119
Transfer of Control of Tribune Company)
From the Shareholders of Tribune Company)
to the Tribune Employee Stock Ownership)
Plan as implemented through the Tribune)
Employee Stock Ownership Trust,)
EGI-TRB, L.L.C., and Samuel Zell)

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**TRIBUNE COMPANY'S
OPPOSITION TO PETITION TO DENY**

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SUMMARY

In this Opposition, the shareholders of Tribune Company ("Tribune") refute the lengthy claims by the Office of Communication of the United Church of Christ, Inc. and Media Alliance (collectively, "Petitioners") that the waiver requests attendant to Tribune's transfer of control applications are not in the public interest. In fact, Tribune presents a very simple and straightforward case for grant of those waivers.

Tribune seeks only temporary waivers of the newspaper-broadcast prohibition (the "1975 Rule") pending completion of an ongoing rulemaking proceeding under the standard articulated by the Commission in the Notice of Inquiry initiating its 1998 Biennial Review. These temporary waivers will not result in any new cross-ownerships, nor will they result in any harm in the cross-owned markets where Tribune has been serving the public admirably for many years. Instead, grant of the requested temporary waivers will permit the public to continue to reap the benefits of Tribune's service in the markets in which it operates while the Commission completes its decade-long commitment to review and revise the 1975 Rule. The relief Tribune requests clearly falls within the scope of proposals before the Commission, and whatever final rules the Commission adopts ultimately will be applied in all five of Tribune's cross-owned markets. In such circumstances, both the Commission and some of the Petitioners have recognized the availability and appropriateness of the requested temporary relief.

As demonstrated herein, and in its initial waiver requests, Tribune operates cross-owned media properties in five of the most diverse and competitive markets in the country, with numerous traditional and non-traditional media outlets competing for advertisers as well as viewers, listeners and readers. Permitting this continued cross-ownership for a temporary period

while new rules are established will allow Tribune to continue to serve the public, consistent with its journalistic tradition of excellence, in the markets in which it operates.

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OPPOSITION TO PETITION TO DENY

The shareholders of Tribune Company (“Tribune”), the transferors seeking to transfer control of Tribune to the Tribune Employee Stock Ownership Plan as implemented through the Tribune Employee Stock Ownership Trust (the “ESOP”), EGI-TRB, L.L.C. (“EGI”), and Samuel Zell, (collectively the “Applicants”) in the above-referenced proceeding, hereby oppose the Petition to Deny filed by the Office of Communication of the United Church of Christ, Inc. (“UCC”) and Media Alliance (collectively “Petitioners”).¹

I. Introduction.

The Applicants seek Commission consent to a corporate restructuring whereby Tribune will convert its publicly-traded shares to cash and become wholly-owned by Tribune’s employees pursuant to the ESOP. As part of this transaction, Tribune will issue rights for up to

¹ In this Opposition, the Applicants also respond to the letter of Free Press, Consumers Union, and Consumer Federation of America registering “strong concerns” with Tribune’s applications and requests for temporary waiver. Although the letter raises no facts or legal argument beyond those raised or made by the Petitioners, the signatories to the letter “strongly support the underlying principles” in the Petition. Applicants also join in support of the Opposition to Petition to Deny being filed today by the Tribune Employee Stock Ownership Plan as Implemented through the Tribune Employee Stock Ownership Trust, EGI-TRB, L.L.C., and Samuel Zell.

40% of its new stock to EGI, controlled by Samuel Zell, with Zell becoming Chairman of the Board of Tribune. Tribune's corporate restructuring was designed not only to provide its shareholders with value, but to ensure that its newspapers and broadcast stations survive in the highly competitive new age of digital media. Through the instant transaction, Tribune, which for more than 100 years has been a leader in the provision of local news and information, will be able to continue to provide the highest quality journalism and entertainment to the public. With this transaction, Tribune therefore has not only maximized value for its shareholders, but also for its employees, and for the public served by the broadcast stations in its diverse and competitive markets. The Applicants seek temporary waivers of the newspaper-broadcast cross-ownership rule (the "1975 Rule") for the sole purpose of facilitating this corporate restructuring, pending the completion of the Commission's review of the 1975 Rule.

Since the Commission initiated its review of the 1975 Rule and concluded that it required revision, the development and widespread adoption of Internet and broadband delivery systems for digital video signals have upended the economics of gathering and presenting local news to the public. Traditional newspaper publishers have lost advertising revenues to Internet competitors, and broadcasters' revenues have eroded as hundreds of new channels and digital outlets compete for advertisers. Similarly, all of these new outlets compete for the eyes and ears of the public. This media revolution has made it more important than ever that local producers of news and information not owned by major broadcast or cable networks be able to share efficiencies to provide the public with quality local news and public affairs programming. Pending completion of the Commission's decade-long review of the 1975 Rule, Tribune's proposed transaction will preserve the quantity and quality of local news available to the public in Tribune's markets, particularly from Tribune's broadcast stations.

Tribune's waiver request does not seek "extraordinary relief." Rather, Tribune seeks temporary waivers in five markets pending the conclusion of the protracted rulemaking proceeding for the sole purpose of facilitating the reorganization so that Tribune may continue its current newspaper and broadcast operations. Tribune has not sought to create any new cross-ownership, or even requested permanent relief from the 1975 Rule for any existing ownership. Instead, based on the standard enunciated when the Commission launched its initial Biennial Review in 1998, Tribune has sought temporary waivers that will preserve the *status quo* until the Commission completes its revision of the 1975 Rule. This revision has been promised for more than a decade, proposed for more than five years, resolved once in 2003, and has been pending on remand since 2004. Tribune here has not asked for any concession on the 1975 Rule, but only interim relief in these limited and particular circumstances while the FCC completes its task of revising that rule.

By granting the requested relief, the Commission will preserve the demonstrable public interest benefits Tribune provides in the cross-ownership markets, while the Commission decides whether or how it will revise the cross-media limits it promulgated four years ago. Tribune's television stations and newspapers are award-winning providers of local news and information that stand independent from the national television networks and other "major media" companies with whom they compete. As demonstrated in its applications, Tribune has been dedicated to American journalism on the local and national levels for more than 150 years.² Tribune has been a broadcasting pioneer since 1924. Its broadcast stations in Chicago, Los Angeles, and New York have led the company's history of innovation, including radio's first remote broadcast, television's first live sporting event, and the invention of instant replay and

² See Application, Exhibit 5, at 1-2.

live aerial news coverage. Today, Tribune television stations broadcast more than 275 hours of local news per week, and last year alone earned 39 local Emmys. Tribune's publications also are known for award-winning journalism and technological innovation, and have won a combined 100 Pulitzer Prizes.

In seeking the denial of the temporary relief requested by Tribune, the Petitioners try to take the Commission and the public back to 1970s – or earlier – when the Commission communicated with the public by issuing mimeograph releases, personal computers did not exist, and the overwhelming majority of the public relied on over-the-air reception of three network-affiliated television stations for their video news and entertainment. The Petitioners do not try to understand, much less acknowledge, the realities of the modern media landscape, the temporary nature of the relief Tribune seeks, the relevance of Tribune's position as a leading independent provider of quality local news and information, and the staggering number of media outlets in the markets in which Tribune operates cross-ownerships.³ Instead, the Petitioners urge denial of Tribune's modest request based solely on their myopic perspective and preferred outcome for the 2006 FNPRM.⁴ This transfer of control proceeding is not the appropriate forum for such

³ See, e.g., Petition at 53 (stating that the "Commission should reject Tribune's request for a *permanent* waiver) (*emphasis added*); Petition at 4 (stating simply that "Tribune is a national media company"); Petition at 33 and 47-48 (absurdly postulating that in Miami and New York City the Commission should not consider television stations and other media serving those communities, despite the fact that Tribune's television stations in these markets are licensed to these communities).

⁴ See 2006 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; 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, Further Notice of Proposed Rulemaking, 21 FCC Rcd. 8834 (2006) ("2006 FNPRM"). Petitioners' objections are nothing but the reactions of opponents of any change in the common ownership rules, fearing even temporary relief based on outdated and simplistic 50-year-old views on diversity that extend even beyond the Supreme Court's decisions in *Red Lion* and *FCC v. NCCB*.

rhetoric, and in so proselytizing, the Petitioners ignore the Commission's clear language and the standard concerning the availability of temporary waivers.⁵ They invite the Commission to indulge their irrelevant conjecture about Tribune's media properties and the Commission's rules.⁶ In their effort to obfuscate the merit in Tribune's request for temporary relief, the Petitioners have ignored Commission precedent and minimized the clear benefits of Tribune's cross-owned efforts, distorting the true nature of the media markets in which Tribune's television stations operate.

The most offensive assertion the Petitioners make about Tribune and the instant transaction is that Tribune has somehow "gamed the Commission's regulatory processes" for nine years in an effort to evade the FCC's rules.⁷ To the contrary, Tribune has followed the Commission's rules and policies since the adoption of the 1975 Rule, and has continued to follow those rules and policies since seeking reexamination of the 1975 Rule more than 10 years ago. During the ensuing decade, there has been widespread consensus, first recognized by FCC Chairman Reed Hundt and spanning the terms of three succeeding Chairmen,⁸ that the 1975

⁵ See 1998 Biennial Regulatory Review, Notice of Inquiry, 13 FCC Rcd. 11276, 11294 (1998) ("Notice of Inquiry").

⁶ See, e.g., Petition at 17-18 (fearing "countless copycats"); Petition at 23-25 (conjecturing about other potential buyers); Petition at 20-21 (hypothesizing potential rule changes not proposed by the Commission).

⁷ Petition at 16.

⁸ In leading a Commission that committed to move "expeditiously" with a proceeding to consider revisions to the newspaper-broadcast cross-ownership policies, Chairman Hundt observed that the 1975 Rule "is right now impairing the future prospects of an important source of education and information: the newspaper industry." *Capital Cities/ABC, Inc.*, 11 FCC Rcd. 5841, 5851, 5856 (1996) (Separate Statement of Chairman Reed E. Hundt). Within the next two years, although finding that Tribune's contentions regarding the application of the 1975 Rule in South Florida were more appropriately addressed in a rulemaking, the United States Court of Appeals for the District of Columbia found that the case for change of the 1975 Rule was "compelling" and "not unsympathetic." *Tribune Company v. FCC*, 133 F.3d 61, 69-70 (D.C. Cir. 1998). Five years later, after the FCC led by Chairman Kennard again adopted a Biennial Review order recognizing the need for a rulemaking and the FCC led by Chairman Powell adopted a notice of proposed rulemaking to revise the 1975 Rule, the Commission adopted the

Rule's outright prohibition on newspaper-broadcast cross-ownership requires revision.⁹ Since that time, the FCC has adopted a revised rule, defended that revision before the Third Circuit, been upheld in large part in eliminating the complete prohibition, and attempted to formulate a judicially-upheld revision. But in all this time, the Internet and the delivery of broadband multichannel digital video programming have seen their dawn and completely revolutionized the transmission of voice, video and data.

Instead of "gaming" the FCC's rules, Tribune has suffered at the hands of this protracted administrative regulatory process that has outlasted several administrative regimes. All the while, Tribune has attempted to operate and plan its businesses for the long term and respond to the needs and interests of its employees and the communities they serve. Instead of "gaming" the Commission's rules, Tribune and its businesses have been impaired by the delays and the prolonged regulatory uncertainty in the process. As a result, Tribune, its employees and

June 2003 Order that repealed the 1975 Rule. See Chicago Waiver Request at 10-11; 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, 18 FCC Rcd. 13620, 13760 (2003) ("2003 Order"), *aff'd in part, remanded in part, Prometheus Radio Project v. FCC*, 373 F.3d 372, 398-400 (3d Cir. 2004), *cert denied*, 125 S. Ct. 2902-03 (2005) ("Prometheus").

⁹ As Chairman Martin stated about the 2003 Order: "[F]or the first time in 28 years, the Order we adopt today finally concludes a review of the newspaper/broadcast cross-ownership rule, which has prohibited a company from owning a newspaper and broadcast station in the same market. Adopted in an era with little cable penetration, no local cable news channels, few broadcast stations, and no Internet, the rule was based on a market structure that bears almost no resemblance to the current environment. Indeed, because of these marketplace changes, we have revised all our other media rules at least once since the ban's adoption. As a result, newspapers have been the only media entities prohibited from owning a broadcast station in the markets they serve, regardless of how large the market was or how many newspapers or broadcast stations were present. For example, in the large markets, two broadcast television stations have been permitted to combine and could own up to six radio stations, as well. Yet, newspapers remained prohibited from owning even a single radio station. Today we correct this imbalance, finally giving newspapers the same opportunities other media entities enjoy in medium and large markets. In so doing, we recognize that newspaper/broadcast combinations may result in a significant increase in the production of local news and current affairs, as well as an improvement in the quality of programming provided to their communities." 18 FCC Rcd. at 13949 (Separate Statement of Commissioner Kevin J. Martin).

the communities it serves and in which it competes have been harmed. The temporary relief Tribune seeks will merely keep that harm from being converted to irreversible punishment.

During these ten years of regulatory review and revision, life has moved forward for the newspaper and broadcast industries at broadband Internet speed. In pursuing its objectives during this time, Tribune has followed the Commission's rules and policies, requesting waivers when Tribune believed circumstances warranted waivers, and fulfilled its promises and the FCC's directives when the FCC granted Tribune waivers. In full compliance with the rules and policies of the FCC, Tribune in 2000 merged with Times Mirror and created three cross-ownerships that were permitted under the decision adopting the 1975 Rule.¹⁰ Given the Commission's pronouncements in the *Capital Cities* and *Renaissance* proceedings and its biennial review orders, Tribune reasonably expected that the Commission would exercise in a timely manner its statutory obligation to revise or eliminate rules that are outdated as the result of competition.¹¹ As we now know, the rulemaking process that began in 1996 has still not concluded, notwithstanding the Commission's holding in June 2003 that the absolute ban of the 1975 Rule no longer serves the public interest, a finding upheld by the Third Circuit in 2004.¹²

¹⁰ 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 F.C.C.2d 1046, 1076 n.25 (1975) ("1975 Order"), *aff'd sub nom. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("FCC v. NCCB"). Tribune already had acquired current station WSFL, Miami, Florida, and been granted a temporary waiver pending the Commission's action on a rulemaking addressing the 1975 Rule. See *Stockholders of Renaissance Communications Corporation*, 13 FCC Rcd. 4717 (MMB 1998).

¹¹ See Telecommunications Act of 1996, P.L. 104-104, § 202(h) (requiring the Commission to determine whether a rule is "necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest.").

¹² Subsequent to its acquisition of Times Mirror, Tribune acquired Station WTXX, Waterbury, Connecticut, pursuant to a "failing station" duopoly waiver and a temporary waiver of the 1975 Rule. See *Counterpoint Communications, Inc.*, 16 FCC Rcd. 15044 (2001) ("*Counterpoint I*"). The FCC originally granted Tribune a permanent waiver of the local television ownership rule to permit the permanent combination of "failing station" WTXX and WTIC, but granted Tribune only a six-month temporary

Given the regulatory status of the 1975 Rule more than three years later, Tribune requested in its renewal applications, as the FCC's rules permit, at least temporary relief until the Commission completed its actions on remand from the Third Circuit's June 2004 order.¹³ Indeed, as shown below, the temporary relief Tribune requested in those renewal applications and the instant transfer of control applications is strongly warranted under the standard articulated for such relief in the Commission's 1998 Biennial Review.¹⁴

The Petitioners' contention that Tribune should have negotiated and consummated any of the various other transactions that were the subject of conjecture in the press is without merit. Under well-established precedent, the Commission cannot and will not consider the potential transactions hypothesized by the Petitioners.¹⁵ As Congress stated clearly

waiver of the Rule to permit the combined ownership of the *Courant* and WTXX. *Counterpoint I*, 16 FCC Rcd. at 15046, 15048. Tribune subsequently was granted a six-month extension of that waiver, conditioned on using its best efforts to comply with the Rule and reporting to the FCC every 45 days on its efforts. *Counterpoint Communications, Inc.*, 17 FCC Rcd. 3243, 3245 (2002) ("*Counterpoint II*"). In August 2002, unable to sell either WTXX or the WTXX-WTIC combination, Tribune sought a permanent waiver of the Rule; alternatively, failing the grant of such relief, Tribune sought an extension of its temporary waiver through the resolution of the Commission's review of the Rule or the WTIC and WTXX renewal terms. *Counterpoint Communications, Inc.*, 20 FCC Rcd. 8582, 8583 (2005) ("*Counterpoint III*"). Contrary to the claims of the Petitioners, Petition at 13, Tribune did not sit idly and await a decision, but made efforts to resolve the matter with the Commission, resulting in the issuance of a letter from the Chief of the Media Bureau indicating that Tribune "was in full compliance" with the FCC's rules and relevant orders. *See id.* at 8583 & n.7. On April 13, 2005, the Commission denied Tribune a permanent waiver of the Rule, but extended the temporary waiver to coincide with the renewal terms for WTXX and WTIC. *Id.* at 8584, 8590. Notwithstanding the ridiculous and unsupported contentions of the Petitioners, Petition at 11-14, during all this time, Tribune not only fulfilled its promises to keep WTXX on the air and maintain significant public interest programming efforts at the stations, but made significant efforts to sell WTXX or divest the WTIC-WTXX duopoly, as the Commission has found on several occasions. While these efforts continue to this day, Tribune has been unable to negotiate a transaction for the television stations at a fair price without unacceptable conditions. *See infra*, Section VIII.

¹³ *See infra*, Section II. Tribune takes umbrage at the Petitioners' claims that Tribune has sought "*post hoc*" waivers and has allowed its licenses to expire and then sought "retroactive waivers." *See* Petition at 8-10, 16. This claim ignores the FCC's substantive and procedural rules, including Section 73.3566, and Tribune's efforts before this Commission and the United States Court of Appeals for the Third Circuit.

¹⁴ *See infra*, Section III.

¹⁵ Petition at 23-25. The suppositions of the Petitioners about potential alternative transactions are

in Section 310(d) of the Communications Act, "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."¹⁶

The Commission thus has long recognized that "the Communications Act, as amended, provides that when the Commission acts on assignment or transfer applications, it may not consider whether the public interest might be better served by assignment of the licenses at issue to another party."¹⁷

Moreover, contrary to the Petitioners' assertions, Tribune has demonstrated that granting temporary waivers pending FCC action on the 2006 FNPRM would yield significant public interest benefits. As demonstrated in the narrative description of the transaction and the requests for temporary waiver, and again below, Tribune will continue the benefits of its television news and public affairs programming for the public that emanate from its cross-ownerships in the diverse and competitive markets in which they operate.¹⁸ If the Commission, unlike the Petitioners, understands and values an emphasis on quality local news and public affairs programming from sources independent of the broadcast networks, it will recognize the

unsupported by any facts and are based on mere conjecture and posturing in the press.

¹⁶ 47 U.S.C. § 310(d).

¹⁷ *Eagle Communications, Inc.*, 10 FCC Rcd. 5330, 5343 (1995). See also *Leon P. Gorman, Receiver*, 39 F.C.C.2d 37, 38 (1973); *Adelphia Communications Corporation*, 21 FCC Rcd. 8203, 8324 (2006) ("[P]ursuant to the language of section 310(d), the Commission must examine whether the transactions before it will serve the public interest without regard to other possible transactions. Thus, we will not speculate about the competitive effects of other hypothetical transactions.").

¹⁸ Of course, the Petitioners are absolutely mistaken in their suggestion that there is anything wrong with maximizing shareholder value, or even that the Commission does not recognize the public interest in this goal, which is a fiduciary responsibility for Tribune's officers and directors under Federal and common law. See *Macfadden Acquisition Corp.*, 104 FCC 2d 545, 559 (1986) ("We seek to accommodate other federal policies in making our own public interest determinations because "[t]he Commission has a duty to implement the Communications Act, but also must do so in a manner as consistent as possible with corporate and federal security laws' protection of shareholders' rights.") citing *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 443 (D.C. Cir. 1985); see also *La Rose v. FCC*, 494 F.2d 1145, 1146 (D.C. Cir. 1974) .

value in Tribune's continued operations. And under the temporary waivers, when the Commission concludes its work on revision to the 1975 Rule, Tribune will comply with the final revised rules, including in Chicago, a market in which Tribune has never been affected by the requirements of the 1975 Rule.

II. Tribune's Transfer of Control Applications Should Not Be Dismissed.

The Petitioners request dismissal of the transfer of control applications on the theory that the licenses for KTLA, WTIC, WTXS and WPIX have expired. Because, in their view, there are "no licenses to be renewed," they cannot be transferred.¹⁹ However, the Commission's renewal application process specifically contemplates the filing of waiver requests, so Tribune's licenses are still in full force and effect, until final Commission actions on the renewal applications occur. As the plain language of Section 73.3566 makes clear, a renewal application is not "patently" defective, and will not be dismissed, if it contains an appropriate waiver request.²⁰ In Tribune's three cross-ownership markets (New York, Los Angeles and Hartford) that were not otherwise grandfathered (Chicago) or already covered by a waiver pending the 2006 FNPRM (Miami), the renewal applications contained the requisite waiver requests, including a detailed description of two alternative forms of relief and an extensive discussion of supporting reasons and facts.²¹

¹⁹ Petition at 15.

²⁰ 47 C.F.R. § 73.3566(a). Section 73.3566(a) states that "applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof."

²¹ The mere fact that the Petitioners have opposed the grant of Tribune's requested relief in renewal proceedings and here does not warrant the dismissal of the transfer of control applications; indeed, the Petitioners' citation of *FCC v. NCCB* confirms that dismissal is not appropriate, contrary to their claim. See Petition at 15-16. There, the Supreme Court left no doubt that requests for waivers of the 1975 Rule are appropriate and that the FCC is obligated to address them. In finding that if the Commission does not

Commission precedent makes clear that applications may be filed that propose operation that is not in accordance with Commission rules if waiver of the rule is requested.²²

The Commission has long recognized that waivers of the 1975 Rule, either temporary or permanent, may be requested and granted in appropriate circumstances, and the Commission therefore is obligated to entertain and consider such requests.²³ Until the FCC acts on Tribune's renewal applications, and until those actions are final, Tribune's licenses are in full force and effect, as mandated by the Communications Act and the FCC's rules.²⁴ Section 307(c) of the Act provides that "[p]ending any hearing and final decision on [a renewal] application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect."²⁵ The D.C. Circuit has been quite clear that Section 307(c) is "unyielding" in its specification that the Commission "shall continue (the) license in effect" pending action on renewal.²⁶ Given this mandate, Petitioners' frivolous arguments for dismissal based on the "expiration" of station license terms must be rejected.²⁷

find "sufficient grounds for waiver or change of those standards," the Commission must "deny the application," the Supreme Court recognized that the FCC must evaluate an applicant's request for waiver of the 1975 Rule, and only deny the application if waiver is not appropriate. *See FCC v. NCCB*, 436 U.S. at 793.

²² *See Donovan Burke*, 104 F.C.C.2d 843 (1986) (application proposing operation in violation of short-spacing rules not dismissed when accompanied by waiver request, despite subsequent finding that denial of waiver was required); *Metromedia Radio & Television, Inc.*, 102 F.C.C.2d 1196 (1985) (application in violation of foreign ownership rules acceptable for filing when construed to contain request for waiver of those rules).

²³ *1975 Order*, 50 F.C.C.2d at 1085; *FCC v. NCCB*, 436 U.S. 775, 788 n.11 (1978) (recognizing that the Commission had stated that it might grant temporary or permanent waivers if the underlying purposes of the Rule "would be better served by continuation of the current ownership pattern").

²⁴ 47 U.S.C. § 307; 47 C.F.R. § 1.62. Moreover, the transferees in this proceeding have agreed to be bound by whatever final action occurs on Tribune's renewal applications, ensuring that they will acquire control of Tribune subject to that Commission action. *See Applications*, Exhibit 13B.

²⁵ *Pinelands, Inc., and BHC Communications, Inc.*, 71 Rad. Reg. 2d (P&F) 175, ¶ 12 n.12 (1992) (quoting 47 U.S.C. § 307(c)).

²⁶ *Committee for Open Media v. FCC*, 543 F.2d 861, 867-68 (D.C. Cir. 1976) (Sections 9(b) and 307(d)

III. **Tribune Has Met The Standard For A Temporary Waiver Pending The Commission's Resolution Of The 2006 FNPRM.**

In addressing the merits of Tribune's request for a temporary waiver, the Petitioners hypothesize various final actions on the 2006 FNPRM "three or more years" from now, all the while exaggerating the illusory threat that granting the requested relief will open the floodgates for more temporary waivers.²⁸ The Petitioners thus ignore that whatever rule the Commission adopts on remand in the ownership proceeding will apply to all of Tribune's stations, and that Tribune is entitled, under the applicable standard, to have that rule applied to those stations.

A. **Application of the Appropriate Standard Warrants the Requested Temporary Relief Pending Action on the 2006 FNPRM.**

Tribune is entitled to the requested relief in accordance with the standard established for the grant of a temporary waiver pending completion of a rulemaking, which the Commission set forth in its notice commencing the initial Biennial Regulatory Review in 1998.²⁹

share an identical purpose: "protection of licensees from the uncertainties stemming from protracted administrative consideration of applications for license renewals.").

²⁷ The Petitioners' citations to *Jefferson Radio*, 340 F.2d 781 (D.C. Cir. 1964) and *G.A. Richards*, 14 F.C.C. 429 (1950), are inapposite. Petition at 15. In these cases, licensees had been found to lack the requisite character and legal qualifications to be Commission licensees, preventing them from assigning or transferring control of their licenses absent special circumstances. Tribune has not been found "unqualified," and has requested waivers in its renewal applications and transfer of control applications that will make it legally qualified.

²⁸ See Petition at 4-5, 17-21 (detailing the FCC's 1975 plan to ensure divestiture of grandfathered markets, contemplating different possible Commission resolutions of the pending rulemaking, and speculating about the potential floodgates for future temporary waivers without any analysis or support).

²⁹ See *Notice of Inquiry*, 13 FCC Rcd. at 11294-95. Instead, the Petitioners often focus on the "fourth prong" of the waiver standard for the 1975 Rule ("the purposes of the rule would be disserved by divestiture"), Petition at 16, 21-22, which is most often applied where parties seek permanent waivers. Tribune is not here seeking permanent waivers, and to the extent the Petitioners seek to employ the "catch-all" criterion of the waiver standard, it must reflect the standard articulated in the *Notice of Inquiry* for the temporary waivers Tribune requests. The Petitioners' citation to *Crosby N. Boyd*, 57 F.C.C.2d 475, 484 (1975), Petition at 6, is similarly flawed. Finally, the Petitioners' recitations concerning the Commission's plans in 1975 for divestiture of grandfathered cross-ownerships, Petition at 5, 22-23, are irrelevant where Tribune seeks temporary relief under the standard articulated in 1998 by the Commission

In the *Notice of Inquiry*, released shortly after the Commission had granted temporary relief to Disney and Tribune,³⁰ the Commission made clear that it would not grant temporary waivers pending the outcome of rulemakings “simply on the grounds that the rule was the subject of an ongoing rulemaking or inquiry proceeding”³¹ The Commission also made clear, however, that “there are limited areas of our broadcast ownership waiver practice where we have consciously departed” from this approach, and acknowledged that the FCC has “both the right and the obligation to review any request for waiver” pending a rulemaking based upon “the specific facts in a particular case.”³²

In articulating a standard to evaluate requests for such “interim waivers,” the Commission noted with approval cases of grants of such temporary relief “where a pending proceeding is examining the rule in question, the Commission concludes that the application before it falls within the scope of the proposals in the proceeding, and a grant of interim waiver would be consistent with the Commission’s goals of competition and diversity.”³³ Evaluating grants of such waivers in “recent years” including those with respect to the television duopoly rule, and comparing them to the situation where it was initiating its inaugural biennial review, the Commission pronounced that grants were “most likely to occur” where “protracted rulemaking proceedings are involved” and “where a substantial record exists on which to base a preliminary inclination to relax or eliminate a rule.”³⁴ As the Commission noted at the beginning of this first biennial review in 1998: “Here, for example, we do not have a protracted proceeding

in its *Notice of Inquiry*.

³⁰ *See supra* at 5 & n.5.

³¹ *Notice of Inquiry*, 13 FCC Rcd. at 11294.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

or a substantial record of any of these rules that leads us to initial conclusions about any specific proposals to modify or eliminate any of the rules at issue here.”³⁵ As always, what is important “is whether the public interest would be served by a grant of the waiver.”³⁶

In its various requests for waiver pending Commission action on the 2006 *FNPRM*, Tribune addressed and met every point of the “conditional waiver standard” the Commission “articulated” in the *Notice of Inquiry*.³⁷ Specifically:

- ▶ With respect to whether “a pending proceeding is examining the rule in question,” Tribune has shown that there is a pending “protracted” proceeding that has been promised for a decade and pending for six years, which includes the release of an NPRM on the 1975 Rule, an order repealing the 1975 Rule, appellate court review of the repeal of the 1975 Rule, and a remand *FNPRM*.³⁸
- ▶ With respect to whether “a substantial record exists on which to base a preliminary inclination to relax or eliminate a rule,” Tribune has shown that the Commission compiled a “substantial record” on which to base its 2003 *Order*, which included much more than “a preliminary inclination to relax or eliminate the rule” — it includes specific findings that have been upheld as reasonable by the Third Circuit, requiring revision of the 1975 Rule.³⁹
- ▶ With respect to whether “the Commission concludes that the application before it falls within the scope of the proposals in the proceeding,” Tribune has shown that its cross-ownerships not only fall within the scope of proposals in a proceeding, but also comply with the revised rule adopted in the 2003 *Order* that the Commission is considering whether to retain or modify.⁴⁰

³⁵ *Id.*

³⁶ *Id.* at 11294-95, citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

³⁷ *Notice of Inquiry*, 13 FCC Rcd. at 11295 n.90 (finding that the temporary waiver pending the rulemaking granted to Tribune for Station WSFL in Miami “was based on special circumstances” does not “stand in contradiction to the conditional waiver standard we articulate here.”); see, e.g., Chicago Waiver Request at 6-17, 33-40.

³⁸ See, e.g., New York Waiver Request at 7-14 and 41-43.

³⁹ See, e.g., *id.* at 11-14, 41-42.

⁴⁰ See New York Waiver Request at 17, 43-45; Los Angeles Waiver Request at 17, 46-47; Chicago Waiver Request at 17-18, 36-37; Miami Waiver Request at 18, 36-37; Hartford Cross-Ownership Waiver Request at 19, 48-49.

► Finally, with respect to whether “a grant of interim waiver would be consistent with the Commission’s goals of competition and diversity” or otherwise in “the public interest,” Tribune has shown that in each market its cross-owned stations provide numerous public interest benefits in the form of new, additional and enhanced news and public affairs programming without any overriding diminution to diversity in these extremely competitive markets.⁴¹

As each waiver request demonstrates, Tribune has presented a compelling case for an “interim” waiver. Further, the public interest, not to mention Tribune, would be disserved by forcing divestiture prior to the Commission’s resolution of the issues surrounding the revision of the 1975 Rule that was remanded by the Third Circuit in 2004. The public in these markets would no longer receive the same programming benefits provided by these combinations.

The Petitioners ignore the language articulated by the Commission in the *Notice of Inquiry* and claim that its application has been rejected twice.⁴² The cases cited by the Petitioners, however, do not “closely resembl[e] this one,”⁴³ and instead only highlight the Commission’s application of the correct standard and the compelling reasons supporting the grant of the requested temporary relief. In *UTV of San Francisco*, in July of 2001, the Commission did deny Fox a temporary waiver pending the “outcome of any future television/newspaper cross-ownership rulemaking.”⁴⁴ In denying Fox’s request, the Commission repeated the warning from its *Notice of Inquiry* that “the mere initiation of a proceeding stating that the rule would be examined, or merely the fact that such a proceeding was on the horizon,

⁴¹ See, e.g., New York Waiver Request at 18-40, 45-47; Los Angeles Waiver Request at 17-43, 47-50; Chicago Waiver Request at 17-33, 38-40; Miami Waiver Request at 18-33, 38-40; Hartford Cross-Ownership Waiver Request at 19-45, 51-53.

⁴² Petition at 18 (citing *Mobilemedia Corporation*, 14 FCC Rcd. 8017 (1999) and *UTV of San Francisco, Inc.*, 16 FCC Rcd. 14975 (2001)).

⁴³ Petition at 18.

⁴⁴ *UTV of San Francisco*, 16 FCC Rcd. at 14988.

would not be sufficient to warrant an interim waiver.”⁴⁵ In claiming that *UTV of San Francisco* closely resembles Tribune’s instant waiver requests, however, the Petitioners ignore every relevant fact, and the language and circumstances discussed by the Commission.

First, the Petitioners ignore that *UTV of San Francisco* was decided and released before the Commission had even released its Notice of Proposed Rulemaking regarding the 1975 Rule.⁴⁶ Since deciding *UTV of San Francisco*, the Commission has:

- ▶ In 2001, issued a Notice of Proposed Rulemaking to consider eliminating or modifying the 1975 Rule, and took comments on that Notice.⁴⁷
- ▶ In 2002, released an additional Notice of Proposed Rulemaking that consolidated the *Newspaper-Broadcast NPRM* with the review of other media ownership rules, and took more comments.
- ▶ In 2003, after extended proceedings, including rounds of comments, studies and hearings, made detailed findings supporting its conclusion that the Rule was no longer justifiable, and repealed the Rule, replacing it with specific cross-media limits that would permit Tribune’s common ownerships.⁴⁸
- ▶ In 2004, had the Third Circuit affirm the portion of the 2003 Order holding the blanket ban contained in the Rule should be repealed, but remand the proposed new rules for further support or amendment.⁴⁹
- ▶ In 2006, released its 2006 *FNPRM*, and despite a tentative conclusion not to revive the “diversity index” in its prior form, asked questions to help it decide whether to retain the 2003 cross-media limits because they can be justified with additional evidence or analysis, or amend them.⁵⁰

⁴⁵ *Id.*

⁴⁶ *UTV of San Francisco* was released on July 25, 2001. The Commission’s 2001 NPRM on the 1975 Rule was not released until September of 2001.

⁴⁷ *Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, 16 FCC Rcd. 17283, 17283-85 (2001) (“*Newspaper-Broadcast NPRM*”); see, e.g., Chicago Waiver Request at 9-10.

⁴⁸ See *supra* at 5 & n.8 & n.9; see, e.g., Chicago Waiver Request at 11-12 (discussing 2003 Order).

⁴⁹ See *supra* at n.8; see, e.g., Chicago Waiver Request at 12-14 (discussing *Prometheus*).

⁵⁰ See *supra* at 4 n.4; see, e.g., Chicago Waiver Request at 13-14 (discussing the 2006 *FNPRM*).

- ▶ In 2006 and 2007, completed a pleading cycle of comments and held multiple hearings on the revisions to the cross-media limits that replaced the 1975 Rule.

Given all of these regulatory developments, under the standard articulated in the *Notice of Inquiry*, there is no resemblance between Tribune's request for a temporary waiver pending the completion of the 2006 FNPRM and the request in *UTV of San Francisco*. Today there is a protracted rulemaking, with multiple findings concerning the revision of the 1975 Rule and the underlying rationale for the repeal of the 1975 Rule, where Tribune's requests fall within the scope of the proposals being considered in the proceeding. In the Petitioners' so-called "case closely resembling this one," there were none of these factors.⁵¹

B. There Will Not Be A Flood of Copycats Resulting from a Grant of Tribune's Request for Temporary Relief, and Such Relief is Not Inconsistent With Prior Orders.

The Petitioners argue that a grant of temporary waivers to Tribune will "undermine and contravene established FCC rules and policies," setting precedent for "countless copycats."⁵² Without any attempt to suggest what other entities might be similarly situated, the Petitioners argue that granting temporary waivers pending action on the 2006 FNPRM will generate a "flood of demands for similar relief."⁵³ However, careful analysis shows no flood will result for many reasons.

First, Tribune's request is a narrow one. Tribune is not seeking temporary waivers for new combinations, but is only seeking to maintain the *status quo* for existing ownerships. Under any precedent set by the relief granted to Tribune, no party could seek to

⁵¹ *Mobilemedia Corporation*, 14 FCC Rcd. 8017 (1999), is similarly of no avail to the Petitioners. In that case, which involved a request for a temporary waiver of Section 24.101, a wireless spectrum cap, the Commission concluded that, at the time, the rulemaking did "not even specifically propose to modify the rule in question." *Id.* at 8026.

⁵² Petition at 17.

⁵³ Petition at 17-18.

establish a new cross-ownership. Very few existing cross-ownerships will need or be able to make similar requests to prevent divestiture.⁵⁴ Second, to the extent parties seek to avoid *divestiture of existing cross-ownerships, under the precedent established here, they will need to demonstrate that they comply with the cross-media limits adopted by the Commission in the 2003 Order, the Commission's last articulation of proposed restrictions.* While these limits permitted a number of cross-ownerships that were previously not permitted (given that the 1975 Rule created a flat ban), there were significant limits to protect smaller markets that the Commission deemed to be clearly "at risk."⁵⁵ Third, Tribune's request involves only the 1975 Rule, the elimination of which was upheld by the Third Circuit. Notably, this is the only one of the media ownership rules that has not been modified since 1975; moreover, given the *2003 Order*, it clearly will not be retained in its 1975 form. Fourth, future rule changes should not require the protracted proceedings encountered here; it is particularly noteworthy that Tribune was promised an appropriate rulemaking in the *Renaissance* litigation before the D.C. Circuit in 1997 and 1998.⁵⁶

Second, the Petitioners fail to apply the Commission's articulated standard. The Petitioners misuse both the interim waiver granted to Tribune in *Renaissance* and the Commission's failure to grant an interim waiver in the ongoing proceeding in Hartford in

⁵⁴ There have been few parties availing themselves of footnote 25 to the *1975 Order*, given the economics of the newspaper industry during the past decade.

⁵⁵ See *2003 Order*, 18 FCC Rcd. at 13760-80.

⁵⁶ Ultimately, it was the Commission's promise to the D.C. Circuit in 1997 during the *Renaissance* appeal that it would conduct an appropriate proceeding on the 1975 Rule, and the standard for temporary waivers that the Commission had previously applied to Disney, that resulted in the "special circumstances" warranting the FCC's grant of the existing temporary waiver for Tribune in South Florida. *Stockholders of Renaissance Communications Corporation*, 13 FCC Rcd. at 4717-18. To the extent parties find themselves similarly subject to potential divestiture of media properties after such protracted proceedings when substantial relief appears relatively imminent, the Commission should willingly apply the standard articulated in the *Notice of Inquiry*, and grant relief when appropriate.

arguing that Tribune's request for temporary relief is not appropriate.⁵⁷ With respect to *Renaissance*, however, Tribune already has made clear that the Commission's cautionary language about not granting waivers based on the "mere initiation" of a rulemaking is no longer applicable, given that this rulemaking proceeding is in its ninth year.⁵⁸ The Petitioners simply fail to deal with the fact that the language they cite from *Renaissance* was adopted before the release of the 1998 Biennial Regulatory Review's *Notice of Inquiry*, in which the Commission provided new guidance on the appropriate standard for temporary waivers pending the completion of rulemakings. As Tribune has shown numerous times, applying that guidance at this stage in the proceeding mandates relief.

With respect to Hartford, it is true that, in granting Tribune an extension of time to divest WTXX, the Commission did not grant interim relief pending completion of the rulemaking.⁵⁹ The Petitioners, however, misrepresent the holding in *Counterpoint III* when they state that the Commission "expressly considered and rejected Tribune's request for a temporary waiver which would last until the completion of the rulemaking proceeding."⁶⁰ The Commission actually held that, at the time, "the public interest was *better* served by extending the waiver" to coincide with the renewal cycle for WTXX and WTIC.⁶¹ Rather than rejecting Tribune's request for the temporary waiver pending the outcome of the rulemaking, the Commission expressly stated:

Because we grant Tribune's request for a temporary waiver pending renewal, *we need not consider* its alternate request for a

⁵⁷ Petition at 9, 13, 18.

⁵⁸ *See supra*, at 14-16.

⁵⁹ Petition at 13, 18; *Counterpoint III*, 20 FCC Rcd. at 8589.

⁶⁰ Petition at 13.

⁶¹ *Counterpoint III*, 20 FCC Rcd. at 8584 (emphasis added); Petition at 13.

waiver pending the ultimate outcome of the Commission's reexamination of the newspaper-broadcast cross-ownership rule.⁶²

While the Commission thus limited the relief it provided to Tribune in Hartford in *Counterpoint III*, it did not indicate that such relief was inappropriate then or at a later time. Rather, it simply did not consider the request, granting Tribune's alternative and more limited request for relief. There is nothing inconsistent with this 2005 holding and Tribune's current request for an interim waiver, particularly after the release of the 2006 *FNPRM*, and after further efforts to divest have failed to produce a sale at a reasonable price without unacceptable conditions.⁶³

C. The Third Circuit's Denial of Tribune's Motion for Stay Does Not Undermine Tribune's Request for Temporary Relief.

The Petitioners' attempt to draw support from the Third Circuit's continuation of its stay of the 2003 *Order* is also without merit.⁶⁴ Indeed, several of the Petitioners themselves argued to that Court that the stay would not harm Tribune because Tribune could obtain *precisely* the sorts of waivers that it is asking for here.⁶⁵ Specifically, the Petitioners told the Third Circuit that "the FCC's waiver process can remediate any of the harms [Tribune] might face from continued enforcement of the existing rules pending completion of the remand."⁶⁶ They also told the Court that the stay would not have "any practical effect" on Tribune's cross-ownership of a newspaper and a television station in South Florida, "because Tribune has already

⁶² *Counterpoint III*, 20 FCC Rcd. at 8589 (emphasis added and footnote omitted).

⁶³ As Tribune has indicated, it has not discontinued its efforts to sell WTXN, or, if possible, to find an alternative disposition that would result in the divestiture of the duopoly.

⁶⁴ See Petition at 21.

⁶⁵ See *Prometheus Radio Project v. FCC*, Nos. 03-3388 et al., Opposition of the Citizen Petitioners to Tribune's Motion for a Partial Lifting of the Stay, filed Aug. 13, 2004 (the "Citizen Opposition"). The Citizen Petitioners included Prometheus Radio Project, Media Alliance, National Council of the Churches of Christ in the United States, Fairness and Accuracy in Reporting, Center for Digital Democracy, and Consumers Union and Consumer Federation of America.

⁶⁶ *Id.* at 9 n.6.