

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

In the Matter of	)	
	)	
Application of Shareholders of	)	MB Docket No. 07-119
Tribune Company (Transferor) and	)	
Samuel Zell (Transferee)	)	
	)	
For Consent to Transfer of	)	
Control	)	

**REPLY OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

**I. INTRODUCTION**

On June 11, 2007, the International Brotherhood of Teamsters (the "IBT") filed comments addressing the above-captioned application (the "Application") seeking the Commission's consent to transfer control of the Tribune Company ("Tribune") and Tribune subsidiaries that are the licensees of multiple broadcast stations. On June 26, 2007, a joint opposition to the IBT's comments (the "Zell/ESOP Trust Opposition") was filed by Samuel Zell; EGI-TRB, L.L.C., a company owned by a trust established by Mr. Zell for the benefit of members of his family (the "Zell Trust"); and "the Tribune Employee Stock Ownership Plan as implemented through the Tribune Employee Stock Ownership Trust (the "ESOP Trust")." The IBT, pursuant to Section 1.45(c) of the Commission's rules,<sup>1</sup> hereby replies to the Zell/ESOP Trust Opposition.<sup>2</sup>

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<sup>1</sup> 47 C.F.R. § 1.45(c).

<sup>2</sup> Although the portion of the Zell/ESOP Trust Opposition that is directed at the IBT's comments is styled as a reply, it is in the nature of an opposition to which the IBT is entitled to reply. See 47 C.F.R. § 1.45(c).

In its comments, the IBT expressed concern with the fact that under the proposed transfer of control the employees of the Tribune apparently would have no voice in the governance of the Tribune, notwithstanding the fact that the employees would be the nominal owners of the Tribune ESOP Plan that would own the Tribune. Rather, two of the Tribune's directors would be designated by the Zell Trust, and the remainder would be designated by a Tribune ESOP Plan trustee that has been pre-selected and cannot be removed by the Tribune's employees.<sup>3</sup> The IBT showed that excluding the Tribune's employees from governance would have an adverse impact on diversity and localism. The IBT asked that the Commission take this adverse impact into account in evaluating the Application and associated waiver requests under the public interest standard. The IBT refutes below each of the arguments made in the Zell/ESOP Trust Opposition on these issues.

## **II. DISCUSSION**

### **A. Section 310(d) of the Communications Act**

Section 310(d) of the Communications Act<sup>4</sup> states that the Commission, in disposing of applications for the assignment or transfer of control of a construction permit or license, "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." In the Zell/ESOP

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<sup>3</sup> See IBT Comments at 5-6.

<sup>4</sup> 47 U.S.C. § 310(d).

Trust Opposition, the parties argue that the Commission is prohibited by Section 310(d) from taking into account the diversity and localism concerns raised by the IBT.<sup>5</sup>

This argument is without merit. The IBT has not asked the Commission to evaluate the Application by considering “a person other than the proposed transferee or assignee,” which is what Section 310(d) prohibits. Rather, the IBT has asked the Commission to evaluate the Application by considering the public interest implications of the governance of the transferee that *has* been proposed. The Commission takes such considerations into account all the time, and Section 310(d) has no bearing on them. For example, the Commission frequently considers in the context of assignment and transfer applications the voting rights held – or not held – by limited partners, members of limited liability companies, and shareholders of corporations.<sup>6</sup> Accordingly, the Commission has ample authority to consider the IBT’s diversity and localism concerns.

## **B. Comparability to Owners of Publicly-Traded Companies**

The parties to the Zell/ESOP Trust Opposition claim that the Tribune’s employees have rights comparable to “the equity owners of a publicly-traded company.”<sup>7</sup> They base this claim on the facts that: (1) “the ESOP will hold 100 percent

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<sup>5</sup> Zell/ESOP Trust Opposition at 15-17.

<sup>6</sup> *See, e.g.*, instructions to FCC Form 315, p. 6 (describing insulation criteria, including voting criteria, for determining whether a limited partner will be considered a party to a transfer of control application); *id.* p. 7 (describing similar criteria for members of limited liability companies); *id.* p. 7 (stating that “[s]tock subject to stockholder cooperative voting agreements accounting for 5% or more of the votes in a corporate [transfer of control] applicant will be treated as if held by a single entity” and that “any stockholder holding 5% or more of the stock in that block is considered a party to ... [the transfer of control] application”).

<sup>7</sup> Zell/ESOP Trust Opposition at 18.

of the equity of the Tribune”<sup>8</sup>; (2) the Tribune’s employees “will ... 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”<sup>9</sup>; (3) the Trustee of the ESOP “owes its fiduciary duty solely to the employee participants in the ESOP plan”<sup>10</sup>; and (4) “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.”<sup>11</sup>

This argument overlooks an essential fact: Although programming and operational decisions are made by a company’s board of directors, the equity owners of a publicly-traded company have the right to determine, by their vote, who the company’s directors will be. If the equity owners do not like the programming and operational decisions that the directors are making, the equity owners can elect different directors. The equity owners of the Tribune ESOP Plan, by way of contrast, would not have the right to vote for the Tribune’s directors, and therefore would lack a voice in the formulation of programming and operational decisions.

The fact that the Tribune’s employees would be able to vote on major decisions, such as mergers and sales of all or substantially all of the Tribune’s assets, moreover, does not make the Tribune employees equivalent to the shareholders of publicly-traded companies for governance purposes. As the Commission has recognized, even non-

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<sup>8</sup> Zell/ESOP Trust Opposition at 16.

<sup>9</sup> Zell/ESOP Trust Opposition at 16.

<sup>10</sup> Zell/ESOP Trust Opposition at 17.

voting shareholders and other passive investors typically are given the right to participate in such extraordinary corporate decisions.<sup>12</sup> The right to vote on extraordinary corporate decisions, therefore, cannot be equated with the right to vote for directors.

Similarly, the fact that the trustee of the Tribune ESOP Plan owes a fiduciary duty to the Tribune's employees is no substitute for giving the employees the right to vote for the Tribune's directors either directly or by being able to instruct the trustee how to vote the Tribune shares that are held by the ESOP. The directors of a publicly-traded company owe a fiduciary duty to their shareholders, too. No one would contend, however, that the shareholders would have a meaningful voice in the affairs of the corporation if they were deprived of the right to select the corporation's directors. The same is true for the Tribune's employees.

### **C. Comity Principles**

The parties to the Zell/ESOP Trust Opposition state that "the voice given to the [Tribune] employees through the ESOP is entirely consistent with ERISA provisions, additional tax related statutes and regulations, and other employee stock ownership plans."<sup>13</sup> Based on their statement, they assert that "principles of comity" would be violated if the Commission were to take into account the diversity and localism

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<sup>11</sup> Zell/ESOP Trust Opposition at 18.

<sup>12</sup> See, e.g., *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*; Memorandum Opinion and Order, 58 R.R.2d 604, n. 72 (1985) (insulated limited partners "may vote on the sale, exchange, lease, mortgage, pledge or other transfer of all or substantially all of the assets of the business other than in the

concerns implicated by the Tribune employees' lack of a meaningful voice in company affairs.

This assertion is a *non sequitur*, because ERISA and the other statutes and regulations that are referred to take no position concerning whether providing a meaningful voice is appropriate. Depriving the Tribune's employees of a meaningful voice may not be *prohibited* by ERISA and the other statutes and regulations. But giving the Tribune's employees a meaningful voice is not prohibited, either. In light of the fact that ERISA and the other statutes and regulations are essentially silent on the "meaningful voice" issue, principles of comity are not implicated.

#### **D. Role of Employees in Diversity and Localism**

The parties to the Zell/ESOP Trust Opposition characterize as "naïve" the notion that "granting additional voting rights to the employee owners of the [Tribune] company would necessarily benefit localism and programming diversity," given that the Tribune's operational and programming decisions will be made by its directors and officers, not its shareholders.<sup>14</sup> The Tribune's directors, however, serve at the will of the shareholders who elect them. The same is true, indirectly, of the officers that the directors appoint. If the Tribune's employees are given a meaningful voice in the election of the company's directors, therefore, the Tribune's directors will need to take

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ordinary course of the business" and "still qualify for an exemption from attribution"), *on reconsideration*, 1 FCC Rcd 802 (1986).

<sup>13</sup> Zell/ESOP Trust Opposition at 17.

<sup>14</sup> Zell/ESOP Trust Opposition at 18.

into account the views of the employees when the directors formulate operational and programming policy for the company.

The parties to the Zell/ESOP Trust Opposition attempt to analogize the diversity and localism concerns raised by the IBT to the comparative credit, which was struck down by the courts, that the Commission at one time awarded to applicants for new licenses if the owners of the applicant proposed to be involved in day-to-day management.<sup>15</sup> A better analogy, however, can be found in the Commission's equal employment opportunity ("EEO") policies.

The Supreme Court has held that the FCC's adoption of EEO requirements for its broadcast licensees "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."<sup>16</sup> The Congress made a similar statement in connection with its passage of the Cable Television Consumer Protection and Competition Act of 1992, finding that "equal employment requirements are particularly important in the mass media area where employment is a critical means of assuring that program service will be responsive to a public consisting of a diverse array of population groups."<sup>17</sup> If diversity in the composition of the workforce that makes day-to-day programming decisions enhances diversity of programming, it follows that diversity in the composition of the owners

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<sup>15</sup> Zell/ESOP Trust Opposition at 19.

<sup>16</sup> *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976).

<sup>17</sup> H.R. Rep. No. 934, 98th Cong., 2d Sess. 84-85 (1984).

who have a voice in the selection of the directors who set programming policy also will enhance diversity of programming. Accordingly, giving the Tribune's employees a meaningful voice in corporate governance will advance the Commission's policies.

### CONCLUSION

For the reasons stated herein and in the IBT's initial comments, the Commission should examine closely the governance of the proposed transferee and take into account the adverse impact on diversity and localism that depriving the Tribune's employees of a meaningful voice would have.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Comments was sent by first class mail, this 9th day of July, 2007, to each of the following:

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