*Before the*
**FEDERAL COMMUNICATIONS COMMISSION**
WASHINGTON, DC 20554

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| In the Matter of | ) | |
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| Shareholders of Tribune Company, | ) | MB Docket No. 07-119 |
| Transferors | ) | |
| | ) | |
| and | ) | |
| | ) | |
| Sam Zell, *et al*. | ) | |
| Transferees | ) | |
| | ) | |
| For Consent to the Transfer of Control of | ) | |
| The Tribune Company | ) | |
| | ) | |
| and | ) | |
| | ) | |
| Applications for the Renewal of License of | ) | File Nos. BRCT-20060811ASH, *et al*. |
| KTLA(TV), Los Angeles, California, *et al*. | ) | |

**PETITION FOR RECONSIDERATION**


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## SUMMARY

Petitioners seek reconsideration of the Commission's November 30, 2007 decision in these consolidated proceedings involving renewal and transfer of control of licenses held by the Tribune Company.

In particular, Petitioners challenge the Commission's decision to deny standing to UCC to challenge the transfer of broadcast licenses in Hartford and Chicago, and to deny standing to Media Alliance to challenge the transfer of Tribune's Los Angeles TV license. Petitioners also seek reconsideration of the grant of an unsolicited permanent waiver of the newspaper/broadcast cross-ownership ("NBCO") rule to allow the transferees to maintain common ownership of Tribune's broadcast properties in Chicago and *The Chicago Tribune.*

UCC and Media Alliance submitted legally sufficient uncontested sworn declarations attesting to the fact that they have qualified members who reside in the cities where Tribune operates TV stations. Without citing authority, the Commission denied standing to challenge the transfers of control in Hartford, Chicago and Los Angeles because UCC and MA did not submit declarations from residents of those markets in their petition to deny the transfers of control.

This decision is inconsistent with past precedent. The Commission has routinely and repeatedly afforded standing to challenge multi-station assignments and transfers based on a single declaration from a national organization attesting to the fact that they have members residing in the communities of license. Moreover, the action flies in the face of established Commission policy to promote the participation of the public in Commission broadcast licensing matters.

The decision to grant an unsolicited permanent waiver to Tribune in Chicago is also arbitrary and capricious and must be reversed.

Tribune has made no affirmative showings which could justify a waiver. In particular, there is no claim that any of the properties at issue are distressed in any way. Nor is this a case where ownership is being returned to a prior owner.

The reasons advanced by the Commission in support of a waiver - the longstanding nature of the Chicago cross-ownership and the expectation that it would continue - are indistinguishable from circumstances that apply to every grandfathered cross-ownership. Moreover, these arguments were considered and rejected by the Commission in its 1975 *Second Report and Order*, as upheld by the Supreme Court of the United States.

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**PETITION FOR RECONSIDERATION**

The Office of Communication of the United Church of Christ, Inc. ("UCC"), Media Alliance ("MA") and Charles Benton (collectively "Petitioners"),[1] by their attorneys, the Institute for Public Representation and the Media Access Project, and pursuant to 47 U.S.C. §405(a) and 47 CFR §1.106(b)(1), respectfully seek reconsideration of the Commission's Memorandum Opinion and Order in these consolidated proceedings. *Tribune Company* , FCC 07-211 (Released November 30, 2007) ("MO&O"). Petitioners seek reconsideration of the decision to deny standing to UCC to challenge the transfer of Tribune broadcast licenses for WTXX(TV) and WTIC-TV in the Hartford,

[1] Petitioner Charles Benton has not previously participated in this proceeding. He appears here to challenge the grant of permanent waiver relief in the Chicago market. See Attachment A. It was not possible for him to participate in the earlier stages of this proceeding because the applicants did not request such a permanent waiver and presented no legal or factual arguments in support of any request for a permanent waiver. Thus, this reconsideration proceeding is the first opportunity Mr. Benton has had to participate in this matter. *See* 47 CFR §1.106(b)(1).

CT market and WGN-TV and WGN(AM) in Chicago, IL, and to deny standing to MA to challenge the transfer of KTLA(TV) in Los Angeles, CA. Petitioners further seek reconsideration of the Commission's decision to grant an unsolicited permanent waiver of the newspaper/broadcast cross-ownership ("NBCO") rule to allow the transferees to maintain common ownership of WGN-TV, WGN(AM), and *The Chicago Tribune* in the Chicago market. Petitioners also seek reconsideration of the grant of indefinite "temporary" waivers of the NBCO rule as to the remaining Tribune properties.[2] Finally, Petitioners seek reconsideration of the Commission's unexplained decision to grant renewal of licenses to stations KTLA(TV), WTIC-TV, WTXX(TV) and WPIX(TV).[3]

## **BACKGROUN**D

The Tribune Company ("Tribune") is a national media company based in Chicago, Illinois, that operates daily newspapers, broadcast TV stations, a local cable news channel in Chicago, a nationally available cable TV network, and a Chicago radio station, as well as many internet websites. In 2000, Tribune's acquisition of The Times Mirror Company added seven daily newspapers to the Tribune portfolio, including three in markets where Tribune already operated TV stations: New York, Los Angeles and Hartford.

Commission policy dictates that a licensee acquiring a co-located newspaper has until its broadcast license comes up for renewal or one year, whichever is longer, to comply with the cross-ownership prohibition. *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*

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[2] The Commission's decision does not address any of the arguments Petitioners made in opposing grant of such indefinite waivers.

[3] The Commission's decision does not address, much less justify, why renewal should be granted as to those four licenses.

*Report and Order,* 50 FCC 2d 1046, 1076 fn. 25 (1975) ("*Second Report and Order*"). Thus, Tribune purchased the Times Mirror properties with knowledge that its common ownership of its broadcast facilities and the newspapers in the same market was impermissible under FCC rules.

Instead of divesting the offending combinations prior to the end of its broadcast license terms, Tribune sought renewal and asked for waivers allowing continued cross-ownership. UCC and MA filed petitions to deny the license renewals of Tribune's cross-owned broadcast stations in Los Angeles, New York, and Hartford objecting to the grant of any waivers.

During the pendency of the renewal applications, Tribune entered into an agreement with Samuel Zell ("Zell") to transfer control of the company, including the three cross-owned stations listed above, as well as cross-ownerships in the Chicago and Miami markets.[4] Accordingly, Tribune and Zell sought five ***temporary*** waivers pending the outcome of the Commission's ongoing review of broadcast ownership rules in Docket 06-121, *et al.* UCC and MA jointly filed a Petition to Deny the entire transaction, including the five ***temporary*** cross-ownership waivers sought in the applications for consent to transfer control of Tribune. *Applications for Consent to the Transfer of Control of Tribune Company from Shareholders of Tribune Company to Samuel Zell*, United Church of Christ and Media Alliance Petition to Deny, MB Dkt. 07-119 (June 11, 2007) ("UCC/MA Petition to Deny").

The Commission ruled on the renewal and transfer applications in a consolidated decision adopted and released on November 30, 2007. The Commission found that UCC had standing to challenge the license renewals of Tribune's licenses in Hartford and New York, MO&O, ¶9 and

[4] The Chicago cross-ownership is grandfathered, and Tribune has a special one-time temporary waiver in Miami. *Renaissance Communications*, 13 FCCRcd 4717 (1998) (MMB).

accepted without discussion that Media Alliance had standing to challenge the renewal of KTLA(TV) in Los Angeles. However, in the transfer proceeding, the Commission granted UCC standing only in the Miami and New York markets and denied UCC standing in the Chicago, Hartford and Los Angeles markets. MO&O, ¶7. It also denied MA standing to challenge the transfer of the Los Angeles station. *Id.*

With respect to the merits, the Commission dismissed all of UCC's and MA's petitions to deny. With respect to the New York, Los Angeles, Hartford and Miami properties, the Commission denied Tribune and Zell's request for temporary waivers in the form requested, *i.e.*, pending the outcome of the broadcast ownership proceeding. Instead, the Commission ruled that, should Tribune seek judicial review of the denial of the waiver in the form originally submitted for those four markets, Tribune would be granted a waiver lasting either for two years or six months after conclusion of the litigation, whichever is longer. MO&O at ¶60. On December 3, 2007, Tribune and Zell each filed Notices of Appeal in the D.C. Circuit challenging the Commission's denial of the waivers in the form requested.[5]

Tribune's grandfathered AM/FM/TV/ newspaper combination in Chicago was treated differently. Although, as noted above, the applicants sought only a ***temporary*** waiver of the NBCO, to last until completion of the Commission's ongoing rulemaking, and Tribune never requested additional relief, the Commission nonetheless granted Tribune a ***permanent*** waiver of the NBCO. MO&O at ¶64.[6]

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[5] *Tribune Company v. FCC*, No. 07-1488 (D.C. Cir.)

[6] Petitioners call attention to the unusual wording of the Commission's ordering paragraph, which does not purport to act upon any aspect of the applications. *Id.*

## I. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO DENY STANDING TO UCC AND MA WITH RESPECT TO SOME OF THE AFFECTED COMMUNITIES.

The Commission erred in denying UCC standing to challenge the transfer in the Hartford, Los Angeles and Chicago markets and in denying MA standing to challenge the Los Angeles transfer. The declarations filed with the petition to deny the transfer clearly fulfill the requirements of Section 309(d)(1) of the Communications Act because they attest to the fact that UCC has members in all of the affected markets and MA has members in Los Angles. Moreover, and quite importantly, the Commission ignored its own finding that UCC and MA were afforded standing in this same proceeding to challenge the Tribune renewals in those markets. These determinations were based on uncontested facts in the record and were fully known to the Commission.

Neither the Commission nor the applicants cite any case that supports the result reached by the Commission here. Indeed, the Commission's action is inconsistent with both past agency precedent and practice and with the Commission's oft-stated desire to encourage public participation in the licensing process

### A. UCC and MA Met the Requirements of Section 309(d) of the Communications Act.

Section 309(d)(1) of the Communications Act requires that a petition to deny "contain specific allegations of fact sufficient to show that the petitioner is a party in interest" and that such allegations "be supported by affidavit of a person or persons with personal knowledge thereof." *See also* 47 CFR.§73.3584(b); 47 CFR §1.16. Notably, the statute does ***not*** require that the "person or persons with personal knowledge" themselves be parties in interest.

UCC/MA's Petition to Deny the Tribune transfers contained allegations of fact that each group has members who are viewers of the television stations being transferred, and supported this

claim with uncontested declarations attesting to personal knowledge from the leaders of those organizations. Specifically, the Petition to Deny included a sworn declaration from Rev. Robert Chase, the Director of Communications of UCC and Executive Director of the Office of Communication of the United Church of Christ, Inc. affirming that "UCC represents residents throughout the U.S. including residents in Los Angeles, Chicago, Ft. Lauderdale-Miami, Hartford, and the Long Island/Southern Connecticut area" and that "a waiver of the [NBCO] would harm members of UCC who reside in the metropolitan area where each of these combinations exist."[7] It also included a declaration from Jeff Perlstein, the Executive Director of MA, which similarly affirmed that "Media Alliance has approximately 1900 members throughout California, a significant number of whom reside in Los Angeles, California," and that these members "would be harmed by a permanent loss of diversity and competition that would result if Tribune is permitted to continue common ownership of KTLA-TV and the *Los Angeles* Times."[8] These declarations are ***uncontested*** on the record, and the Commission must therefore accept them as true. *Astroline Communications Company v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). Standing alone, they alone are sufficient to satisfy the requirements of Section 309(d).[9]

Without citing any authority, Zell's Opposition argued that the Petitioners did not submit declarations from "local declarant[s]" in each of the file affected markets and that "[o]nly with respect to the New York and Miami Markets may the FCC even proceed to consider petitioners' allegations." Zell Opposition. at 6. The Commission agreed with Zell on this point and rejected

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[7] UCC/MA Petition to Deny at Attachment A.
[8] UCC/MA Petition to Deny, at Attachment E.
[9] UCC went beyond what was required to include declarations from a UCC pastor residing in the Miami DMA and two UCC ministers residing in the New York DMA.

UCC/MA's argument that standing to file a petition to deny against one application that is part of a multi-station transaction automatically confers standing to oppose every application. MO&O at ¶¶ 6-7.

In arriving at its decision, the Commission failed to explain why the declarations from the Director of UCC affirming representation of members in all of the markets and from the Director of MA affirming representation of members in the Los Angeles market were not sufficient to establish standing. Nor did it cite any authority for this proposition.

### B. It Would Be Arbitrary and Capricious to Deny Standing to Challenge the Transfer While Permitting the Same Groups to Have Standing to Challenge Renewals in the Same Market.

Even if the Commission could properly hold that petitioners to deny must submit declarations from residents in each affected market to demonstrate standing in a multi-market transfer, it would be arbitrary and capricious to deny standing in this case because the docket in this consolidated proceeding contains precisely such evidence with respect to UCC in Hartford and MA in Los Angeles. *See* 47 U.S.C. §309(d)(2) (directing the FCC to consider "the application, the pleadings filed, or other matters which it may officially notice....").[10]

In its Petition to Deny KTLA(TV)'s license renewal, MA provided affidavits from two Media Alliance members residing in Los Angeles.[11] In its Petition to Deny the license renewals for WTXX(TV) and WTIC-TV in Hartford, UCC provided declarations from three members residing in the Hartford area.[12] The Commission, quite properly, accepted the validity of the declarations and

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[10] Further, to resolve any doubt, Attachment B contains the declaration of Bennie Whiten, Jr. a UCC member who resides in the Chicago market, and Attachment C contains additional declarations from David Adelson and Jay Levin.

[11] David Adelson and Jay Levin.

[12] Eric Anderson, Mary B. Reynolds and James M. Morgan.

afforded standing to UCC and MA to challenge the respective Tribune renewals.

Section 310(d) of the Communications Act expressly provides that applications for transfer of control "shall be disposed of as if the proposed transferee...were making application under Section 308...," *i.e.*, for renewal. Given the identical standard, for the Commission to find that UCC and MA have standing to challenge the Tribune renewals based on their having members in the affected markets, but to deny them standing to challenge transfers involving the same markets would be an act of regulatory cognitive dissonance and would be irreconcilable with established precedent. *Hispanic Broadcasting Corporation*, 18 FCCRcd 18834, 18835, fn. 4 (2003); *Chronicle Broadcasting Co.*, 59 FCC2d 335, fn.3 (1976); *KSAY Broadcasting Co.*, 45 FCC2d 348, 349 (1974).[13]

**C. The Commission's Denial of Standing Is Inconsistent with Past Agency Practice and Precedent.**

Not only does the Commission fail to cite any precedent for denying standing for the Hartford, Chicago, and Los Angeles market, but its decision is contrary to past Commission policy dating from at least 1980 and reaffirmed as recently as last year. Indeed, the Commission has repeatedly afforded standing to challenge multi-market transactions without requiring declarations from residents in each affected market.

Neither the Commission order nor Zell's Opposition cites a single case where the FCC previously denied standing to an organization with members in the affected communities for failure to include a declaration from a member residing in the community. In fact, all precedent is to the contrary.

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[13] In those cases, the Commission conferred standing based on a prior determination that the organization had established its standing. Here, UCC and MA's standing was established not simply in an earlier proceeding, but in this, the very same proceeding, by means of consolidation. Thus, a finding of standing in this case is even more appropriate.

The Commission has consistently held that "individual listeners and viewers *as well as groups representing them may qualify as parties in interest* under section 309(d)(1) of the Communications Act." *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC2d 89, 93 (1980) ("1980 MO&O") (emphasis added). In 1980, the FCC rejected a petition for rulemaking from the National Association of Broadcasters that would have erected barriers to associational standing by requiring groups filing petitions to deny to submit detailed information about their organizations. 1980 MO&O at 93. In that opinion, the Commission issued a policy statement holding that "the fact that many people may suffer the same injury is no reason to deny standing" and, accordingly, that "an association may establish standing as the representative of its members, as long as it alleges that one or more of its members has standing." 1980 MO&O at 95-96.

The Commission reaffirmed this position just last year when it found that two national organizations, Free Press and National Hispanic Media Coalition (NHMC), had standing under Section 309(d) to challenge the transfer of Title III licenses from Adelphia to Time Warner and Comcast for hundreds of communities, including Boston, Philadelphia, Los Angeles, Cincinnati, and Dallas. The Commission rejected the applicants' claims that the organizations lacked standing, finding that Free Press and NHMC were parties-in-interest because their pleadings were "accompanied by affidavits of persons with personal knowledge of the facts alleged in the petitions." *Adelphia Communications Corporation*, 21 FCCRcd 8203, 8216 at ¶20 (2006). The Commission explicitly referenced the single sworn declaration of Ben Scott, the Policy Director of Free Press, and the single sworn declaration of Alex Nogales, President and CEO of NHMC, both of whom averred that their organizations had members residing in the many communities presently served by

Comcast, Time Warner, and Adelphia. *Id.*, fn. 73.[14]

This is hardly a new policy. The Commission has repeatedly afforded standing in similar situations. For example, in *AM/FM, Inc.*, 15 FCCRcd 16062, 16077, fn. 38 (2000), the Commission relied upon on a single declaration from the national President of the petitioning organization to find that the group had standing to challenge transfers of some 490 radio station authorizations. The Commission based on its determination on the unchallenged assertion that the petitioning organization had members throughout the country who listen regularly to the affected stations. It made a similar ruling in *Hispanic Broadcasting Corporation*, 18 FCCRcd 18834, 18835, fn. 4 (2003), in which standing was afforded to challenge 65 radio transfers based on a single declaration from the president of the petitioning group "who states that he resides within the service area of one of [the transferor's] stations, to which he listens regularly." So, too, in *Telemundo Communications Group*, 17 FCCRcd 6958, 6965, fn. 18 (2002), the Commission afforded standing to challenge the transfer of 28 television stations. The Commission ruled that

> [T]he Hispanic Groups claim standing by relying on the fact that they are members and representatives of Hispanic organizations and that some of their members are residents within the viewing area KVEA-TV, Corona, California, one of the stations being transferred from Telemundo to NBC. One of these members claims in a Declaration that he will be seriously aggrieved if the Petition to Deny is not granted because he will be deprived of program service and diversity in the public interest. We find that the Hispanic Groups have demonstrated standing to file their petition to deny. *See CHET-5 Broadcasting, L.P.*, 14 FCCRcd 13041, 13042 (1999).

*Id.*

The Chase and Perlstein declarations meet and exceed the standard accepted in these prior

[14] It is also noteworthy that in this and other cases, the Commission did not treat the petition to deny as a series of individual challenges to each application, but as a single challenge to the entire transaction.

cases by asserting that their organizations have members residing in the areas served by Tribune. Thus, the Commission departed without explanation from its prior precedent in denying them standing to challenge all of the transfers.

Zell cites *Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 543-544 (D.C. Cir. 2003) for the proposition that "[t]o support standing as petitioners, an association's members must assert residence in the relevant market and regular viewing or listening to the broadcast station at issue." Zell Opposition at 5-6 and fn. 9. However, that case does not address whether a declaration from an individual viewer is required in addition to a declaration from the head of the organization claiming affected members. Rather, in *Rainbow/PUSH,* the court rejected Article III standing solely because the declarations submitted did not state an injury-in-fact that was "concrete and particularized."[15] In contrast, here, the Commission explicitly rejected Tribune's argument that UCC failed to aver any particularized harm. The Commission explicitly found that "[t]he cross-ownership rules were adopted to promote diversity of ownership and, thereby, diversity for the benefit of the public," and that a viewer of the station had "standing to present an argument that he or she would be harmed if the cross-ownership rules were waived." Tribune MO&O at ¶9.

### D. The FCC's About Face In Standing Policy Runs Counter To The Goal of Encouraging Public Participation in Broadcast Transactions.

The new precedent established in this case would cause grievous harm were it allowed to stand because it would undermine the Commission's goals of enabling and promoting public participation in broadcast licensing. Needlessly requiring an organization to obtain declarations for

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[15] *Id.* a*t* 542-544. The Court focused on the fact that "Rainbow's real claim of injury goes to the alleged deprivation of 'program service in the public interest,' but that claim is not sufficiently 'concrete and particularized' to pass constitutional muster." *Id.* at 544.

members in every community affected by a transfer is not required by the Communications Act, but it does make public participation much more difficult.

Listener standing is an important public policy goal which has been recognized by Congress, the courts, and the Commission. As the D.C. Circuit has held, "unless the listeners -- the broadcast consumers -- can be heard, there may be no one to bring programming deficiencies or offensive overcommercialization to the attention of the Commission in an effective manner." *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1004-1005 (D.C. Cir. 1966). In implementing this statutory policy, the Commission has said that

> the drafters of section 309(d)(1) intended to allow anyone with standing to appeal a licensing decision to qualify as a party in interest* * * *Under these requirements, an individual, a newly formed group or group with non-local members may achieve standing.

1980 MO&O, at 93. More generally, the Commission's task is to address, and not to evade, important issues relating to the public interest. As the Court of Appeals has said:

> Regardless of the formal status of a party or the technical merits of a particular petition, the FCC should not close its eyes to the public interest factors raised by materials in its files. We have noted that, as a general matter, the federal agencies should construe pleadings filed before them so as to raise rather than avoid important questions. They should not adopt procedures that foreclose full inquiry in to the broad public interest questions, either patent or latent.

*Retail Store Employees Union, Local 880, v. FCC*, 436 F.2d 248, 254 (D.C. Cir. 1970) (internal citations omitted).

The Commission has repeatedly affirmed its goal of facilitating participation by the public and the groups that represent them. For example, in its decision implementing the Children's Television Act, the Commission stated that one of its chief objectives is to "encourage the public to participate in promoting broadcasters' compliance." *Policies and Rules Concerning Children's Television Programming*, 11 FCCRcd 10660, 10726 (1996). Similarly, in a recent NPRM, the

Commission proposed to enhance public notice requirements for license transfer to encourage greater public participation. There, it found that "section 309 of the Act and Section 73.3580 of the Commission's rules are designed to promote public participation in the broadcast licensing process....Section 73.3580 is designed to ensure that listeners and viewers will have a meaningful opportunity to participate in the license assignment process." *Revision of the Public Notice Requirements of Section 73.3580*, Notice of Proposed Rulemaking, 20 FCCRcd 5420 (2005).

For these reasons, the decision to deny standing is a significant departure from past practice and policy. It must be reversed.

## II. THE COMMISSION'S DECISION CONFERRING AN UNSOLICITED *PERMANENT* WAIVER OF THE NBCO IN CHICAGO IS ARBITRARY AND CAPRICIOUS AND MUST BE REVERSED.

The Commission's unprecedented action of conferring an unrequested and unjustified ***permanent*** waiver of the NBCO in Chicago is arbitrary and capricious and must be reversed.

Although the Commission originally identified four bases upon which NBCO waiver requests could be granted, the first three require affirmative showings as to financial conditions, which, quite obviously, Tribune did not even attempt to provide. Tribune's request for ***temporary*** relief sought to invoke the last of those four listed criteria, the so-called "catch all" provision. This requires a finding that denial of the application would disserve the purposes of the Commission's NBCO, *i.e.*, to foster competition and diversity. *Second Report and Order*, 50 FCC2d at 1085.

The Commission's application of the permanent waiver criteria has been parsimonious. Each of the four prior permanent waivers was granted only after the applicants affirmatively demonstrated

the existence of a financially threatened property.[16] As the Commission itself concedes, the "sole justification [advanced by Tribune] is the existence of the pending [NBCO] rulemaking. MO&O, ¶23.

Since the Commission first adopted the NBCO in 1975, it has never granted an unsolicited permanent waiver. It has never before granted a waiver without making detailed findings of fact. In this case, the Commission does not even mention its own standard, much less make the requisite factual determinations. Far from justifying its extraordinary change in policy, the Commission does not even allude to the case law it is abrogating. Its entire discussion of the decision consists of one paragraph that does little more than state the obvious, which is that the cross-ownership is of long standing and that the Commission has twice granted permanent waivers in large markets. On this basis, the Commission concludes

> that the nature of the market involved combined with the uniquely long-term symbiotic relationship between the broadcast stations and the newspaper warrants a permanent waiver. In this regard, our examination of the record confirms "the myriad public interest benefits that have resulted over the almost 60 years of Tribune's common ownership of WGN-TV, WGN(AM), and the Chicago Tribune in the Chicago DMA." In addition, unlike Chicago, Tribune knew at the time it created the combinations in the other markets that they did not comply with the Commission's rules and that divestiture ultimately was required unless those rules changed. We conclude that in the unique circumstances present here, forced separation of the Tribune, WGN-TV, and WGN(AM) would diminish the strength of important sources of quality news and public affairs programming in the Chicago market and that any detriment to diversity caused by the common ownership is negligible given the nature of the market. Therefore, we conclude that the purposes of the rule would not be served by divestiture.

MO&O, ¶34.

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[16] *Kortes Communication, Inc.*, 15 FCCRcd 1846 (2000); *Columbia Montour Broadcasting Co. Inc.*, 13 FCCRcd 13007 (1998); *Fox Stations, Inc.*, 8 FCCRcd. 5341 (1993); *Field Communications*, 65 FCC2d 959 (1977).

Because the Commission's logic here would apply to the sale of ***every*** grandfathered cross-ownership, it does not follow existing waiver policy or create a new policy, but instead effectively eliminates the Commission's policy for the sale of cross-owned properties. Even more importantly, the Commission's action contradicts longstanding agency precedents, including the central element of the Commission's 1975 NBCO decision. The core goal of that policy, as upheld by the Supreme Court, was to obtain ever greater degrees of diversity *via* prospective operation of the NBCO, as upheld by the Supreme Court of the United States. Abandonment of that policy without a detailed explanation for the revised policy is further grounds for reversal.

## A. Commission Precedents For Permanent NBCO Waivers Turn On Factors Not Present Here.

The Commission's decision does not discuss, and cannot be reconciled with, the history of the Commission's adoption, implementation and enforcement of the NBCO. For this reason, Petitioners quote at length from the Commission's decision in *Capital Cities/ABC, Inc.*, 11 FCCRcd 5841 (1995), a case in which the applicant had a far more compelling case for a permanent waiver than the one requested here,[17] and in which the applicant presented a detailed public interest showing, including commitments for public service not present here:

> In the *Order* adopting the daily newspaper cross-ownership rule, the Commission noted that the term public interest encompasses many factors, including "the widest possible dissemination of information from diverse and antagonistic sources." *Second Report and Order*, 50 FCC 2d at 1048 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). While the promotion of diversity in programming service was of primary concern to the Commission in establishing this rule, the Commission also sought to prevent undue concentration of economic power. *Id.* at 1080. ***Although the Commission required immediate divestiture only in instances where it deemed the combinations "egregious," it made clear that***

[17]The newspapers in question were not the dominant properties in the market, and the cross-ownerships involved only radio stations.

> ***"once a sale is to take place, the rule would require a split in an existing [grandfathered] combination" and "will apply to all applications for assignment or transfer ...."*** *Id.* at 1076. Upon reconsideration we reaffirmed this requirement, *Second Report and Order Recon.,* 53 FCC 2d at 591 n. 6 ("If existing combinations are voluntarily sold, it must be to separate buyers."), and it has been upheld by the Supreme Court and subsequently reiterated by the Commission. *See FCC v. National Citizens Comm. for Broadcasting,* 436 U.S. 775 (1978); *see also Fox Television Stations, Inc.,* 8 FCC Rcd at 5347-48 (The rule was thus crafted ... to apply prospectively to new ownership patterns however created, whether by initial application and construction or by acquisition through assignment or transfer of control."); *Washington Star Communications, Inc.,* 54 FCC 2d 669, 672 (1975) (The rule "prohibit[s] the creation of new newspaper-broadcast cross-ownerships in the same area and the perpetuation of ... existing combinations through voluntary assignments or transfers to a single party.").
>
> ***We adopted this approach because we believed that any new licensing should be expected to add to local diversity. Second Report and Order, 50 FCC 2d at 1075. The Supreme Court noted that this "change in the Commission's policy toward new licensing offered the possibility of increasing diversity without causing any disruption of existing service," and held that, "[i]n light of these considerations, the Commission clearly did not take an irrational view of the public interest when it decided to impose a prospective ban on new licensing of co-located newspaper-broadcast combinations." FCC v. National Citizens Comm. for Broadcasting, 436 U.S. at 797. Furthermore, we did not consider the requirement to split up grandfathered combinations upon their sale to be unduly harsh because any decision to sell an existing combination would be taken by the owner on an entirely voluntary basis. Second Report and Order, 50 FCC 2d at 1076.***

*Capital Cities/ABC, Inc.*, 11 FCCRcd at 5885-86. (Emphases supplied.)

In rejecting the requested waivers, the Commission also discussed in detail the relevant criteria and precedents, all of which are directly at odds with the Commission's holding in this case:

> ...[A]t the time we adopted the newspaper-broadcast provision, we also specified four instances in which we would consider permanent and temporary waivers of this rule: * * * * Under the fourth waiver category, we stated that we would examine any "special circumstances" advanced by the party has having a bearing on the appropriateness of granting waiver. *Second Report and Order,* 50 FCC 2d at 1085 n. 47, and we also clearly indicated that parties should not seek a waiver premised on views rejected at the time we adopted the rule. *Id.* at 1085; *Second Report and Order Recon.* 53 FCC 2d at 593***. We have subsequently reiterated that "we will not relitigate in waiver cases issues that were settled by the Se-***

> ***cond Report and Order."*** *Hopkins Hall Broadcasting,* 10 FCC Rcd at 9766; *see also Fox Television Stations, Inc.*, 8 FCC Rcd at 5348.
>
> * * * * ***Commission precedent has established that a permanent waiver of the rule entails a "considerably heavier" burden of justification than a temporary waiver, see Hopkins Hall Broadcasting, 10 FCC Rcd at 9764; Fox Television Stations, Inc., 8 FCC Rcd at 5348 (citing News America Publishing, Inc. v. FCC, 844 F.2d 800, 803 (D.C. Cir. 1988)), and that such a waiver would not be granted absent "highly unusual facts," News America Publishing, Inc. v. FCC, 844 F.2d at 803, or "extraordinary circumstances."*** *Metropolitan Council of NAACP Branches v. FCC,* 46 F.3d at 1163. Indeed, the Commission has stated that it would waive this rule only in situations where its application would be "unduly harsh." *Second Report and Order,* 50 FCC 2d at 1077; *NewCity Communications of Massachusetts, Inc.*, 10 FCC Rcd at 4986 n.8.

*Id.* , 11 FCCRcd at 5886. (Emphases supplied.)

As is clear from the foregoing passage, the Commission's policy is firmly against any decision which allows the transfer of a cross-ownership because it does not add to local diversity. The burden on the Commission in acting *sua sponte* to grant Tribune a ***permanent*** waiver is "considerably heavier" than that which would support a temporary waiver, and must be supported by "highly unusual facts." It cannot be met by relitigating arguments considered and rejected by the Commission.

### B. The Commission's Rationale for Granting a Permanent Waiver Effectively Overrules the Commission's 1975 *Second Report and Order* Adopting the NBCO.

The Commission decision in this case was based on two allegedly unique characteristics of Tribune's applications. In fact, each of them apply to ***every*** existing grandfathered cross-ownership. Thus, the decision in this case effectively eliminates the Commission's current policy.

The first thing to which the Commission points is that the Chicago cross-ownership is almost 60 years old. But venerability is not a distinction; it is a unifying characteristic of cross-owned properties. By definition, ***every*** grandfathered cross-ownership was present when the Commission

initiated its NBCO proceeding in 1970, and in practice, all of them date back to at least 1960.[18] Moreover, the Commission considered - and decisively rejected - this claim as a basis for allowing cross-ownership. *See Second Report and Order*, 50 FCC2d at 1066-67.

The Commission's second consideration is that Tribune did not know at the time that it created the Chicago cross-ownership that the Commission would later prohibit the sale of those properties to a single purchaser. This, too, is not a distinction of any kind, but is true of ***every*** grandfathered cross-ownership. So also was this argument was considered and rejected by the FCC and the courts as a basis for relief. *See Second Report and Order*, 50 FCC2d at 1066-67.

Plainly, there is absolutely nothing in the record which is different from what any cross-owned applicant could show, much less anything "highly unusual." Nor has the applicant made any special commitments to justify the lesser diversity resulting from the transfer of the cross-ownership to a single purchaser. And there is not the slightest suggestion in the record that the Chicago properties are in financial distress.

**C. The Commission's Effort to Distinguish *Fox* and *Field* is Belied by Agency Precedent.**

The only effort the Commission has made to address its precedent is in one sentence and a footnote, which read as follows:

> As the Transferees point out, "the Commission has granted a permanent waiver of the [NCBO] rule for common ownership of a newspaper and a television station in the very market at issue here--the third largest market in the country--as well as in a similar market."[68]
>
> [68] Application BTCCT-20070501AGE, Transferee's Exhibit 18 (Request for Waiver) at 38-39, citing *Fox Stations*, 8 FCC Rcd. 5341 (1993); *Field*, 65 F.C.C.2d 959 (1977). Although those decisions involved distressed stations, they are similar in that

[18] It is impossible to imagine that the Commission would find that a 47 year-old cross-ownership is less worthy of being preserved than a 60 year-old cross-ownership.

> they involve large, competitive, and diverse TV markets. *See id.* ("The market at issue here contains significantly more media competition and diversity than the New York City market analyzed in 1993 and the Chicago market analyzed in 1977.")

MO&O, at ¶34.

The Commission's discussion of its prior decisions is misleading and incomplete. Here again, the Commission's controlling analysis in the *Capital Cities/ABC, Inc*. decision shows that market size was barely relevant, if at all, to the two permanent waivers at issue, and that financial distress and the viability of the properties was central to the decision to grant waivers. Moreover, the Commission placed great weight on the fact that both involved the ***reacquisition*** of the properties by prior owners:

> [W]e have waived the rule only twice in the past twenty years. In 1977 we waived the rule to allow the publisher of two daily newspapers in Chicago to reacquire control of UHF station WFLD-TV, Chicago, noting that *reacquisition* of the station did not constitute a new ownership pattern. We also noted that the station involved in the waiver request had only recently become financially viable, and that the sale occurred as a result of "the complete liquidation" of the assignor. *Field Communications Corp.*, 65 FCC 2d at 960-61. Likewise, in 1993 we waived the rule in order to allow the owner of WNYW-TV, New York, New York to continue to control that station after *reacquiring* the *New York Post.* In that case evidence demonstrated that this ownership might be crucial to the newspaper's survival and we therefore granted waiver in order to preserve a media "voice." *Fox Television Stations, Inc.*, 8 FCC Rcd at 5342, 5350.

*Capital Cities/ABC, Inc.*, 11 FCCRcd at 5887.[19]

The Commission went on as follows:

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[19]*See Hopkins Hall Broadcasting, Inc.*, 10 FCCRcd at 9764, 9766 ("The exigencies of those particular cases (*i.e.*, a struggling UHF station in Chicago; a bankrupt newspaper in New York) are not present in this case. No evidence has been presented that either WLIJ or the Times-Gazette is suffering financially. Likewise, there is no former relationship and no financial tie between the property to be acquired and the buyer, as there was in *Fox* and in *Field*. Furthermore, the asserted public benefit is one that was considered before and rejected when we adopted the present rule.")

> * * * *[I]n our *Second Report and Order*, we noted that "once a sale is to take place, the rule would require a split in an existing combination. No divestiture would be effected nor hardship created since this is a voluntary action by the seller." 50 FCC 2d at 1076. Thus, contrary to Disney's assertions, it is quite obvious that the Commission, in the *Second Report and Order* and the cases implementing it, did not limit application of the rule to transfers that resulted in *new combinations,* but also to those that resulted in *new ownership* of old combinations, noting that "any new licensing should be expected to *add* to local diversity" and that the rule would therefore "bar combinations that would not do so." *Id.* at 1075 (emphasis added). While granting this waiver will not create a new combination, the merger will result in new ownership of the relevant media properties. This makes Disney's waiver requests distinguishable from both *Fields* and *Fox*, where, as previously mentioned the entity seeking to acquire one of the media properties had previously controlled the property or had a continuing financial interest in it. *Fox Television Stations, Inc.*, 8 FCC Rcd at 5342; *Fields Communications Corp.*, 65 FCC 2d at 961.

*Id.*, 11 FCCRcd at 5889-90;

Thus, the Commission's own precedent decisively rejects the very analysis now offered in support of the grant of a permanent waiver. The Commission has not attempted to address this dispositive case law or offer any reasons why it should now be abandoned.

## CONCLUSION

Wherefore, the Commission should reverse and vacate its November 30, 2007 decision, grant the relief requested here and grant all such other relief as may be just and proper.

Respectfully submitted,

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*Counsel for Petitioners*

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Heather Goldman
Georgetown University Law Center

December 31, 2007

# ATTACHMENT A

# DECLARATION OF CHARLES BENTON

My name is Charles Benton.

I am a resident of Evanston, IL.

I am a regular viewer of the television stations serving the Chicago area, including WGN-TV.

I am a regular listener of radio stations serving the Chicago area, including WGN(AM)

I reside within the circulation area of *The Chicago Tribune* and regularly read that newspaper.

The FCC's decision to grant the Tribune Company, and its subsequent transferees ("Tribune"), a new permanent waiver allowing common ownership of *The Chicago Tribune*, WGN-TV, and WGN(AM) harms me by reducing the number of independent local media voices available in my community that would otherwise exist.

It was not possible for me to oppose grant of a permanent waiver to Tribune at an earlier time because Tribune did not request a permanent waiver and thus there was no notice that a permanent waiver would be at issue.

This Declaration has been prepared in support of the foregoing Petition for Reconsideration.

This statement is true to my personal knowledge, and is made under penalty of perjury of the laws of the United States of America.

Date Executed:

Charles Benton

# ATTACHMENT B

**DECLARATION OF BENNIE WHITEN, JR.**

1. My name is Bennie Whiten, Jr. and I am a member of the United Church of Christ.
2. I reside at 4512 S. Greenwood #4 Chicago, IL 60653
3. I am a regular viewer of the television stations serving the Chicago area, including WGN-TV.
4. I am a regular listener of radio stations serving the Chicago area, including WGN(AM)
5. I reside within the circulation area of *The Chicago Tribune* and regularly read the newspaper.
6. The FCC's decision to grant Tribune, and its subsequent transferees, a new permanent waiver to commonly own *The Chicago Tribune*, WGN-TV, and WGN(AM) harms me by reducing the number of independent local media voices available in my community that would otherwise exist.
7. This Declaration has been prepared in support of the foregoing Petition for Reconsideration.
8. This statement is true to my personal knowledge, and is made under penalty of perjury of the laws of the United States of America.

Date Executed: 12/20/07

Bennie Whiten Jr.

# ATTACHMENT C

**DECLARATION OF JAY LEVIN**

1. My name is Jay Levin. I am a member of Media Alliance and a resident of Los Angeles.
2. I reside at 1073 Hanley Ave Los Angeles, CA 90049
3. I am a regular viewer of the television stations serving the Los Angeles area, including KTLA.
4. I reside within the circulation area of *The LA Times* and regularly read the newspaper.
5. Tribune's common ownership of *The LA Times* and KTLA harms me by reducing the number of independent local media voices available in my community.
6. This Declaration has been prepared in support of the foregoing Petition for Reconsideration.
7. This statement is true to my personal knowledge, and is made under penalty of perjury of the laws of the United States of America.

Date Executed: 12/26/07

Jay Levin

[NAME – PLEASE DELETE ALL CAPS TEXT]

## DECLARATION OF DAVID ADELSON

1. My name is David W. Adelson. I am a member of Media Alliance and a resident of Los Angeles.

2. I reside at 245B 4th Ave. Venice CA 90291.

3. I am a regular viewer of the television stations serving the Los Angeles Area, including KTLA.

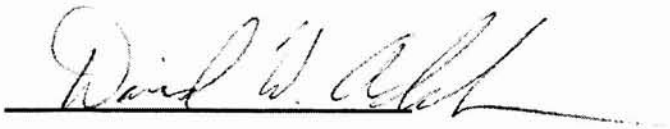
4. I reside within the circulation area of *The LA Times* and regularly read the newspaper.

5. Tribune's common ownership of the *LA Times* and KTLA harms me by reducing the number of independent local media voices available in my community. As a result of the FCC's de facto grant of Tribune's cross-ownership waiver requests, *The LA Times* and KTLA will be commonly owned for at least two years and possibly permanently.

6. This Declaration has been prepared in support of the foregoing Petition for Reconsideration.

7. This statement is true to my personal knowledge, and is made under penalty of perjury of the laws of the United States of America.

Date Executed: Dec. 28, 2007



**Certificate of Service**

I, Andrew Jay Schwartzman, hereby certify that on this 31st day of December, 2007, a copy of the foregoing *Petition for Reconsideration* was served by first-class mail, postage prepaid, upon the following:

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