Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
Shareholders of Tribune Company	)	
Transferors	)	
and	)	MB Docket 07-119
The Tribune Employee Stock Ownership Plan, Sam Zell	)	
and EGI-TRB, LLC	)	
Transferees	)	
	)	
For Consent to Transfer Control of The Tribune Company	)	
and	)	
Applications for Renewals of License	)	BRCT-2--6-811ASH, *et al*.

REPLY TO OPPOSITIONS TO PETITIONS TO DENY

The Office of Communication of the United Church of Christ, Inc. ("UCC"), Media Alliance ("MA") and Charles Benton (collectively, "Petitioners") respectfully submit this reply to oppositions to their December 31, 2007 *Petition for Reconsideration* ("Recon.") filed in this docket by Samuel Zell, the Tribune Employee Stock Ownership Plan and EGI-TRB, LLC (collectively, "Zell") and by The Tribune Company ("Tribune").

I. CHARLES BENTON HAS STANDING AND THE RIGHT TO PARTICIPATE.

Petitioner Charles Benton, a citizen who did not participate in the first stage of this proceeding, seeks reconsideration of the grant of an unsolicited permanent waiver for Tribune's Chicago properties. He swears in his uncontested declaration that "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." Recon at Attachment A.

Tribune and Zell concede that they did not request a permanent waiver. Nor do they suggest that it was foreseeable the Commission would take the unusual step of granting a permanent waiver

sua sponte. Clearly, then, it was not possible for Mr. Benton to have anticipated that the Commission might grant relief which was not requested. Thus, he had good reason to choose not to file a petition to deny based on the relief the Applicants requested.

Zell nonetheless presumptuously contends that Mr. Benton should be ejected because the harm he alleges "would have arisen from a waiver of any duration," and that he therefore should have filed a petition to deny the request for a temporary waiver. Zell at 5, n.10. Although Tribune does not expressly ask that Mr. Benton be denied the right to participate, it is even more presumptuous in arguing that Mr. Benton had no "good reason" why he did not participate in the initial stage of the proceeding because (according to Tribune) he "was no doubt aware of the proceedings ongoing at the Commission...and simply chose not to participate...." Tribune at 6.

Zell incorrectly equates the harm caused by temporary and permanent waivers. The harm arising from a permanent waiver is fundamentally different from a temporary waiver, which is often granted for the purpose of facilitating a smooth divestiture and minimizing disruption to the public and to affected parties. The notion that it is up to Zell or the FCC to decide the injury threshold which requires a citizen to take action is not only presumptuous but also irrational; it would invite a flood of litigation every time a minor or temporary waiver were sought.

Tribune suggests that a citizen waives the right to challenge an action which causes severe harm because he chose not to challenge a different request that would cause much less harm. Tribune at 6. But it is surely up to Mr. Benton to decide the level of harm which justifies taking the extreme action of retaining counsel and subjecting himself to the rigors of being a litigant.[1]

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[1]The cases cited by Tribune are wholly distinguishable. *Fleet Call, Inc.*, 6 FCCRcd 6989 (1991), involved a belated effort to challenge issues which were squarely presented by the applicants

II. UCC AND MA HAVE STANDING TO PARTICIPATE ON A NUMBER OF GROUNDS.

In the *Petition for Reconsideration*, UCC and MA demonstrated that they fully met the standing requirements of Communications Act. Under Section 309(d)(2) the Commission is obliged to base its actions upon "the application, the pleadings filed, or other matters which it may officially notice...." The facts in the record established the requisite elements for standing.

A. Under Established Precedent, Uncontested Standing in New York and Miami Is Sufficient to Establish UCC's Standing to Challenge a Multi-City Transaction.

The Commission's finding that UCC has standing in New York and Miami is also sufficient to establish UCC's standing to challenge the entire Tribune transaction. There is no serious dispute that UCC has members in all five cities where Tribune requested waivers. However, the Commission failed to heed the D.C. Circuit's admonition that standing is not "intended to create a 'gotcha' trap whereby parties who reasonably think their standing is self-evident" are excluded. *American Library Association v. FCC*, 401 F.3d 489, 493 (D.C. Cir. 2005). Instead, without citation, the Commission rejected UCC's standing claims in Chicago, Hartford and Los Angeles because UCC did not present declarations from residents of those cities as part of its *Petition to Deny*.

Petitioners presented a series of cases in which the Commission afforded associational standing based on the presentation of a single declaration from a member with standing in one city in a multi-city transfer or assignment. Recon. at 8-11. Zell and Tribune ignore that this is a single proceeding, and that the Tribune acquisition is a single transaction, with a single docket number and

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at an earlier stage. It was not the opponent's first opportunity to participate. And in *Arizona Mobile Telephone Company*, 80 FCC2d 87, 91 (Rev. Bd. 1980), the Review Board found as a matter of fact that an earlier Commission order was "broad enough to have alerted petitioners...." As noted in the text, p. 1, *supra*, no one claims that the permanent waiver issue was foreseeable here.

which the Commission resolved *en block*.[2] Neither presents a single case which holds to the contrary.

Tribune does not discuss the case law presented by Petitioners and instead merely cites to several cases involving single city ***renewals***. In a single-city renewal case, it is obvious that the only injured parties are listeners in that area. By contrast, as the case law shows, in a multi-city ***transfer***, citizens in each city to the transaction are injured when the entire transaction is approved.

Zell similarly relies on a number of inapposite renewal cases. While Zell also discusses two transfer cases cited by Petitioners, this response is nothing but *non-sequiturs*. Zell says that "in *Hispanic Broadcasting Corporation*, [18 FCCRcd 18834, 18835 n.4 (2003)],...the petitioner accorded standing had challenged the ownership structure of the proposed owner and the proposed transaction...," Zell at 8, which is a distinction without a difference, since UCC and MA have done essentially the same thing. As to *Telemundo Communications Group*, 17 FCCRcd 6958, 6963-6948 (2002), Zell says "in that case, the petitioners did in fact submit a declaration from a local resident from an affected market." That of course, is exactly what UCC did here.

B. The Factual Record of this Consolidated Proceeding Conclusively Demonstrates That UCC and MA Have Standing.

Even if it were necessary to establish standing on a city by city basis, UCC and MA have established their standing in this consolidated renewal and transfer proceeding. In challenging Tribune's renewals in Hartford and Los Angeles, UCC and MA submitted uncontested declarations from members residing in those communities which conclusively establish that UCC and MA have

[2]Although the docket encompassed many different applications, this is true even when a single station is transferred or assigned.

members in those markets and that assert that they face injury from continued newspaper/broadcast cross-ownership. It is arbitrary and capricious to ignore these facts on the record in this proceeding to deny UCC and MA standing as to the transfers of the same properties.

Tribune does not even attempt to rebut this point. However, FCC Zell takes an atomistic view of the standing requirements, saying that the license renewal declarations "filed as they were against applications pending months before the Transfer Applications, could not have established standing...." Zell at 10.

Zell thus overlooks entirely the fact that the Commission consolidated the renewals and transfers. Moreover, the subject of each renewal proceeding was Tribune's request for waiver of the newspaper/broadcast cross-ownership rules, and the harm alleged is identical. It is irrational to posit that Petitioners could be injured by grant of a waiver in a renewal context but not by a waiver involving the same properties in a consolidated transfer proceeding.

C. The Supplemental Declarations Submitted with the Petition for Reconsideration Provide an Independent Basis for Standing.

Whatever doubt there might have been as to UCC's standing in Chicago and MA's standing in Los Angeles was cured in the *Petition for Reconsideration* by the submission of supplemental declarations from members in those communities. The issue here is a factual one - does UCC have injured members in Chicago and does MA have injured members in Los Angeles? The declarations available to the Commission in the record conclusively demonstrate that they do.

Zell does not contest that the supplemental declarations establish standing. However, Tribune claims, in a footnote, that "such affidavits clearly could have been produced in connection with the Petition to Deny." Tribune at 6 n.16. Here, too, the question is not when the declaration was produced, but whether, as a matter of fact, there are members in the relevant markets. Moreover, accepting supplemental declarations is consistent with Commission practice. *Nancy Naleszkiewicz*,

5 FCCRcd 7131 (CCB 1990).[3] Indeed, even though the federal courts apply a far more stringent screen for Article III standing than the Commission does for statutory standing, *see California Association of Physically Handicapped v. FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985), the D.C. Circuit has often allowed supplemental declarations to clarify standing. *See, e.g, American Library Association v. FCC, supra; Branch v. FCC*, 824 F.2d 37, 40 (D.C. Cir. 1987) (Bork, J.).

III. THE COMMISSION'S GRANT OF AN UNSOLICITED PERMANENT NBCO WAIVER IN CHICAGO IS ARBITRARY AND CAPRICIOUS.

Petitioners made a detailed showing of the deficiencies in the Commission's award of an unsolicited permanent waiver of the NBCO for Tribune's Chicago properties. They pointed to the fact that the short and highly generalized explanation for grant of this sweeping benefit set forth reasons which are indistinguishable from almost every grandfathered cross-ownership. The effect of this action was to nullify *sub silentio* the Commission's 1975 decision adopting the NBCO. In particular, they asserted that the arguments advanced by Tribune were insufficient under Commission case law.

The two oppositions devote very little attention to defending the Commission majority's reasoning or discussing the merits of the case law upon which Petitioners rely.[4] Instead, they expend much more effort reciting self-serving material from Tribune's waiver request and to describing what, in their view, the Commission could have, or should have found.

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[3] *See id.* ("The Committee was remiss in not including its standing showing in its Petition. Nevertheless, its failure to do so is not fatal to its claim of standing.")

[4] Petitioners argued that the Commission has failed to make the detailed findings of fact required by agency precedent and that "the Commission's logic here would apply to the sale of ***every*** grandfathered cross-ownership." Recon at 15. Tribune answers by claiming, without citation, that the Commission contemplated granting permanent NBCO waivers "even in situations not involving economically distressed media properties." Tribune at 9. This overlooks 35 years of jurisprudence and the reality that financial distress has been the determinant in each of the four permanent waivers granted since the Supreme Court affirmed the *Second Report and Order.*

Tribune says that "the FCC's action was clearly based on the specifics of Tribune's showing concerning the operation" of Tribune's Chicago properties. Tribune at 12. It then moves on to a four page discussion of facts alleged in its own application, but which were not mentioned, much less relied upon, by the Commission in its short discussion. MO&O at ¶34.[5]

However, the issue raised on reconsideration is whether the reasoning of the Commission withstands scrutiny, not whether the Commission should have written a decision more to the liking of the Tribune and Zell. There is nothing in paragraph thirty-four of the Commission's decision which could possibly be considered to incorporate the application language cited by Tribune and Zell.

In response to Petitioners' lengthy quotation from the most detailed current Commission precedent setting forth the high standard it has established for grant of permanent NBCO waivers *Petition to Deny*, at 15-17 (citing *Capital Cities/ABC, Inc.*, 11 FCCRcd 5841, 5885-86 (1995)). Tribune incorrectly claims that "the Commission there was not addressing a grandfathered combination, but instead was addressing newly-formed combinations in the proposed transaction." Tribune at 10. In fact, *Capital Cities/ABC, Inc.* ***did*** involve grandfathered properties.[6] It goes on to dismiss *Capital Cities/ABC, Inc.* as "decade-old" and contends it has been superceded by the Commission's *2003 Biennial Review Order*, 18 FCCRcd 13620 (2003), "making reliance on these

[5]Zell's response is shorter, but similar, pointing to "Tribune's very detailed 65-page request for waiver...." Zell sneers at "Petitioners' equally misguided assertion that the Commission's conclusions could be drawn for every existing grandfathered cross-ownership," insisting that this "ignore[s] the unique benefits delivered by" Tribune. But, as with Tribune, it refers to material in the application which was not mentioned or relied upon by the Commission.

[6]*Id.* ("In addition, our rules require that, absent a waiver, the grandfathered newspaper-broadcast combinations in Fort Worth and Pontiac/Detroit be split upon sale.") *See also, id.*, 11 FCCRcd at 5880-81 (discussing why grandfathered properties should be divested).

proclamations in *Capital Cities/ABC* specious at best." *Id.*, at 11.[7]

The 2003 Biennial Review Order is inoperative as precedent. No matter how much Tribune might wish it to be otherwise, the Third Circuit refused to lift its stay of that decision. *See Petition to Deny* at 12. That aside, Tribune's rejection of *Capital Cities/ABC, Inc.* is belied by the fact that in 2005, two years ***after*** the *Biennial Review* decision, the Commission relied on the same legal principles in denying a permanent waiver to Tribune in Hartford, *Counterpoint Communications, Inc.*, 20 FCCRcd 8582, 8589 (2005).[8]

Tribune and Zell also go to great lengths to construe the Commission's 1975 *Second Report and Order* as being consistent with the action taken here. The centerpiece of Tribune's argument is that "The Commission clearly intended to grant waivers...where the waiver fosters diversity of viewpoints and programming because the combination has a significant history of providing enhanced news and public interest programming and the media marketplace is already vibrant and diverse." Tribune at 12.

However, the Commission has never said any such thing. Indeed, in adopting the NBCO, it expressly considered, and rejected, precisely the arguments Tribune now presents. *Second Report and Order*, 50 FCC2d 1046, 1085 (1975).[9] And in allowing for waivers, it emphasized that "[W]e would not be favorably inclined to grant any request premised on views rejected when the rule was

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[7]Tribune and Zell have also argued that the Commission should use a DMA in analyzing newspaper/broadcast transactions. *Capital Cities/ABC, Inc.* unequivocally confirms that "the relevant market for analyzing the effects these combinations have on diversity and competition, however, is not the DMA." *Id.*, 11 FCCRcd at 5890.

[8]In fact, the Commission favorably cited *Capital Cities/ABC, Inc.*, 20 FCCRcd at 8585 n.15.

[9]"The argument has been made that integrating broadcast and newspaper operations enables the licensee to provide service in the public interest which could not be provided if the operations were conducted independently and under separate ownership" *Second Report and Order,* 50 FCC2d at 1064.

adopted, as we do not intend to relitigate resolved issues." *Second Report and Order*, 50 FCC2d at 1085.

CONCLUSION

For the reasons set forth above, Petitioners ask that the Commission reconsider its decision in this matter, that it afford standing to each of the Petitioners as to the entire transaction at issue, that it vacate its grant of a permanent waiver as to Tribune's Chicago properties, and that it grant all such other relief as may be just and proper.

Respectfully submitted,

/s/

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Certificate of Service

I, Andrew Jay Schwartzman, hereby certify that on this 25th day of January 2008, a copy of the foregoing *Reply to Oppositions to Petition for Reconsideration* was served by first-class mail, postage prepaid, upon the following:

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