

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
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	)	MB Docket No. 06-121
	)	
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	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate to Build on Earlier Studies	)	MB Docket No. 04-228
	)	
Public Interest Obligations of TV Broadcast Licensees	)	MM Docket No. 99-360
	)	

**REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION**

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May 16, 2008

## REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

Pursuant to 1.429 of the FCC rules, Common Cause, Benton Foundation, Consumer Action, Massachusetts Consumers' Coalition, NYC Wireless, James J. Elekes, and the National Hispanic Media Coalition ("Petitioners"), by their attorneys the Institute for Public Representation, reply to oppositions to our petition which sought reconsideration of certain aspects of the FCC's order in the *2006 Quadrennial Regulatory Review*. 23 FCC Rcd 2010 (2008) ("*Order*"). Specifically, we show that our petition for reconsideration was timely filed and respond to industry objections concerning our proposals for enhanced public notice of proposed cross-ownerships, for prompt consideration of waiver requests when a licensee acquires a co-located newspaper, and for tightening the local television limit.

### I. The Petition For Reconsideration Was Timely Filed

Media General and Gannett assert that to the extent our petition for reconsideration pertains to their waivers, it should be dismissed as untimely. Media General's argument is based on the faulty premise that the *Order* was an adjudicatory decision triggering a due date based on the release of the order instead of its publication in the Federal Register. Opp. at 2. Gannett argues that the *Order* was an interlocutory decision not subject to petitions for reconsideration. Opp. at 5-6. Both arguments are wrong for the reasons set forth below.

The *Order* was the product of a notice and comment rule making proceeding initiated by both a remand and a statutory mandate to revise media ownership rules. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3<sup>rd</sup> Cir. 2004). The *Order* spent almost 124 pages discussing the various rules and only one paragraph discussing the Media General and Gannett waivers, which it laid out as exceptions to the newspaper-broadcast cross-ownership ("NBCO") rule, not separate adjudicatory decisions. *Order* at ¶77. This paragraph was not identified as an

adjudicatory order or set off in any way from the rest of the text; indeed, it was included under the heading III(B)(2), “Presumption Against All Other Combinations.”

Moreover, the FCC analogized its action to “the 1975 *rulemaking*, [where] the Commission evaluated each of the existing newspaper/broadcast combinations to determine whether divestiture was appropriate in light of its decision to adopt the cross-ownership ban.” *Id.* at ¶76 (emphasis added). In allowing Media General and Gannett to continue holding combinations formed by acquisitions occurring after the date of the stations’ last renewal, the FCC stated: “We thus grandfather these combinations in the same manner as the Commission did in 1975.” *Id.* at ¶77.

In reviewing the FCC’s 1975 order, the court concluded that the FCC’s decision to grandfather most existing combinations was not supported by the record. *NCCB v. FCC*, 555 F.2d 938, 965-966 (D.C. Cir. 1977). Although the Supreme Court overturned the D.C. Circuit’s decision on this point, *FCC v. NCCB*, 436 U.S. 775, 777 (1978), it is clear that both courts viewed the decision to grandfather the newspaper-broadcast combinations as a rule making decision. In fact, the D.C. Circuit referred to the parties as petitioners and respondents, not appellants and appellees. 555 F.2d at 938.

For these reasons, we logically assumed that the FCC’s analogous grandfathering of Media General’s and Gannett’s pre-existing combinations were part of the rule making decision. However, because some of the Petitioners here had not participated in the rule making, and those that did had not addressed the merits of allowing the Media General and Gannett combinations to

continue,<sup>1</sup> counsel interpreted 47 U.S.C. § 405(a) to require them to seek reconsideration so as to exhaust their administrative remedies and give the FCC an opportunity to cure the problem.

Thus, we filed a petition for reconsideration pursuant to FCC Rule 1.429, which governs petitions for reconsideration of rule making decisions.<sup>2</sup> Like § 405(a), Rule 1.429 provides that petitions for reconsideration must be filed “within thirty days from the date of public notice.” Rule 1.429 refers to Rule 1.4(b) for the definition of “public notice,” which states that “[f]or purposes of this section, the term ‘public notice’ means . . . (1) For all documents in notice and comment and non-notice and comment rule making proceedings required by the Administrative Procedures Act, 5 U.S.C. 552, 553, to be published in the Federal Register, including summaries thereof, the date of publication in the Federal Register.”

Because the *Order* was a document in a notice and comment rule making, it was required to be published in the Federal Register by the APA. We filed our petition for reconsideration on March 24, 2008, which Media General concedes was within 30 days of Federal Register publication. Opp. at 5. Thus, our petition for reconsideration of the *Order* was timely filed.

**A. The FCC Should Reject Media General’s Claim that the Petition for Reconsideration Is Untimely**

Nonetheless, Media General claims that the NBCO exceptions in the *Order* were adjudicatory, and that petitions for reconsideration of those exceptions should have been filed pursuant to 47 C.F.R. § 1.106, which requires that petitions for reconsideration be filed pursuant to Rule 1.4(b)(2), thirty days from the date on which the FCC decision is released. Media General cites a note to Rule 1.4(b)(1) which states that “licensing and other adjudicatory

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<sup>1</sup> Neither the FNPRM nor the Chairman’s proposal for revising the NBCO rule asked for comments on grandfathering existing combinations. However, some of the Petitioners here filed objections in the license renewal proceedings in which Media General requested waivers.

<sup>2</sup> 47 C.F.R. §1.429. See Pet. for Recon. at 1.

decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2).” Opp. at 2-5.

Clearly, the grant of the waivers to Media General was not a licensing decision. Media General’s license renewals for the four stations that received waivers were granted in a separate decision issued by the Media Bureau.<sup>3</sup> Thus, the only issue is whether the decision to grandfather these four pre-existing combinations was part of the rule making or was an “other adjudicatory decision.” We have already demonstrated above why the grandfathering was a rule making decision. Thus, Media General’s interpretation of the FCC’s rules relies on the mistaken assumption that the NBCO exceptions are “other adjudicatory decisions.”

Media General also ignores the plain language of Rule 1.106, which instructs “[f]or provisions governing reconsideration of Commission action in notice and comment rule making proceedings, see § 1.429. *This § 1.106 does not govern reconsideration of such actions.*” 47 C.F.R. 1.106(a)(1) (emphasis added). Rule 1.106 does not distinguish between different types of actions taken in notice and comment rule making proceedings – it merely concludes that such actions should be reconsidered exclusively under Rule 1.429.

Moreover, Black’s Law Dictionary defines adjudication as “the legal process of resolving a dispute.” Yet the FCC’s action in the *Order* cannot be characterized as resolving a dispute, which normally involves hearing evidence on both sides and rendering a decision. Here the FCC only considered evidence presented in Media General’s comments, and did not consider any evidence on the other side, even though parties had filed petitions to deny Media General’s license renewals and accompanying waiver requests.

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<sup>3</sup> *WJHL-TV, Johnson City, Tennessee, Application for Renewal of License File No. BRCT-20050401BYS, et al.*, DA 08-522 (Mar. 25, 2008).

Thus, it is clear that Rules 1.429 and 1.4(b)(1) govern the filing date for our petition for reconsideration rather than Rules 1.106 and 1.4(b)(2).<sup>4</sup> But even if the FCC concludes that 1.106 applies here, it still has the authority to, and indeed should, consider our petition for reconsideration. While the statute requires that petitions for reconsideration be filed within thirty days after public notice, the definition of “public notice” is left to the FCC. And although “[t]he agency’s interpretation is entitled to deference, [] if it wishes to use that interpretation to cut off a party’s right, it must give full notice of that interpretation.” *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987). “Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the rule.” *Id.*

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<sup>4</sup> Neither of the cases cited by Media General support its position. Opp. at nn.12, 14. Media General asserts that in *Maritime Communications*, 3d MO&O, 18 FCC Rcd 24391, 2439 (2003), the FCC partially rejected a petition seeking reconsideration of an adjudicatory order because it had been filed more than thirty days after the release date. However, this case actually dealt with a different question. In *Maritime* the FCC dismissed petitioner’s license application in the Automated Maritime Telecommunications System in a separate section of a rule making order released April 9 adopting a regulatory framework for that service. See *Maritime Communications*, 2d M&O and 5<sup>th</sup> R&O, 17 FCC Rcd 6685, 6719-20 (2002). The petitioner timely filed a petition for reconsideration of the FCC’s licensing decision on May 8. Later, he filed a second petition for reconsideration of the dismissal of his application on August 26, thirty days after the FCC’s decision was published in the Federal Register. The FCC found the May 8 petition was timely filed and did not address whether its decision to dismiss the application was a rule making or adjudicatory decision, but simply assumed it was a licensing decision. *Id.* at 24396. Thus, it treated the April 26 petition, at least as it related to the dismissal of the application, as an untimely supplement to the timely filed May 8 petition.

*ACR Electronics, Inc., Order on Recon*, 18 FCC Rcd 11000 (2003), involved a rule making decision that, in a separate section labeled “Other Issues,” dismissed pending waiver applications that it found were moot in light of the rule changes. *Amendment of Part 95*, 17 FCC Rcd 19871, 19874-75 (2002). Although the Commission found that the reconsideration requests, which were made in letters to the Wireless Telecommunications Bureau, were untimely under Rule 1.106, it does not appear that the petitioners argued that the request was brought under Rule 1.429. Moreover, the FCC also found that the petitioners violated Rule 1.106(i)’s requirement that petitions for reconsideration be submitted to the FCC Secretary. 18 FCC Rcd at 11001.

We filed the petition with a reasonable belief that it was governed by Rule 1.429. In an analogous case, *Adams Telecom, Inc. v. FCC*, the court denied the FCC's motion to dismiss as untimely petitions for review of FCC denials of pioneer preferences filed within sixty days of publication in the Federal Register rather than from the release of the order. The court observed:

We understand why, upon reading the Commission's rules, the petitioners believed that the Order's Federal Register publication date, rather than the earlier "release date," triggered the 60-day review period. 47 C.F.R. § 1.4(b)(1) clearly states that the time for seeking judicial review of "documents in ... rule making proceedings" is measured from the publication date. The Order, entitled "Amendment of the Commission's Rules ...," appears to fit the description of a "document" in a "rule making proceeding."<sup>5</sup>

Subsequently, in *Satellite Broad. Co.*, the court reversed and remanded the FCC's dismissal of OFS applications as untimely filed where the applications were filed by the due date in Washington, D.C. instead of Gettysburg, and did not reach Gettysburg by the due date. The court found that the FCC may not punish a party for "reasonably interpreting Commission rules." 824 F.2d at 4. Similarly, to dismiss this portion of our petition for reconsideration as untimely filed would punish Petitioners for reasonably interpreting FCC rules.

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<sup>5</sup> 997 F.2d 955, 957 (D.C. Cir. 1993). The FCC later departed from the *Adams* interpretation and amended Rule 1.4 to "clarify that proceedings that do not fall within the class of rule making decisions that must be published in the Federal Register, such as adjudicatory matters, e.g., individual licensing decisions and waivers as to specific parties, do not come within the scope of section 1.4(b)(1), even if the decision happens to be related to, or issued in, an on-going rule making docket." *Amendment of Section 1.4 of the Commission's Rules*, 15 FCC Rcd 9583, 9584 (2000). However, the actual text of the amendment, which consisted of the addition of a "Note to Paragraph (b)(1)," says nothing about waivers or grandfathering. It simply states that "licensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed" by 1.4(b)(2). This does nothing to resolve the question of whether the FCC's action was an adjudication or a rule making. Nor is the answer self-evident. See Pierce, *Administrative Law Treatise*, § 8.1 (2002) (noting that "many categories of agency action could fit within the APA definition of either 'adjudication' or 'rule-making.'").

**B. The FCC Should Reject Gannett's Argument That Part of The Order Was Not A Final Decision**

Gannett claims that we are barred from challenging the FCC's grant of its waiver because the *Order* is not "a reviewable final action." Opp. at 5. Not only is Gannett's argument inconsistent with *Media General's*, but it is contrary to the facts. As discussed above, grandfathering the Gannett and Media General combinations was not a separate adjudicatory action but rather part of the rule making *Order*, which is clearly a final action, as evidenced by the fact that Gannett and others have filed petitions for review in the courts.<sup>6</sup>

Gannett cites to *N. Am. Catholic Educ. Programming Found., Inc. v. FCC* to support its claim that a "waiver decision does not mark the consummation of the agency's decisionmaking process." Opp. at n.16 (citing 437 F.3d 1206, 1209 (D.C. Cir. 2006)). This case involved competing applications for ITFS licenses. In a single order, the FCC denied the Foundation's application, granted the competing application of a school district, and waived the rule limiting an ITFS licensee to only four channels. The Foundation initially filed a notice of appeal under 47 USC §402(b). When the "Court issued an order to show cause why the appeal should not be dismissed as untimely, the Foundation refashioned its argument as a petition for review" under § 402(a). *Id.* at 1208. The Court rejected this attempt finding that the FCC's decision on the waiver petition was "was ancillary to the ultimate licensing decision, as evidenced in part by the fact that the waiver and licensing decisions were rendered simultaneously." *Id.* at 1209. The present case differs from *Catholic* because Gannett's license renewal was granted in a separate Media Bureau order while the FCC made the "waiver" decision in the *Order*.

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<sup>6</sup> *Gannett v. FCC*, D.C. Cir. No, 08-1101, consolidated with *NAA v. FCC*. DC Circuit, Dkt. No. 08-1082.

Treating the *Order* as interlocutory would also violate due process which requires that the public be afforded notice and a right to be heard. Gannett argues that “the public had more than adequate notice regarding the Phoenix waiver request” filed in 2006, and yet did not object. Opp. at 2. Specifically, it points to the FCC’s Public Notice dated June 5, 2006.<sup>7</sup> However, that Public Notice consisted of a few lines on the tenth page of a twenty seven page document listed in the FCC’s Daily Digest titled “Broadcast Applications.” Even if residents of Phoenix knew to regularly check the Daily Digest and read through all applications listed to find the KPNX renewal, this notice would only notify them that KPNX had filed for renewal, not that it was seeking a waiver of the NBCO rule.<sup>8</sup>

Moreover, it is unreasonable to claim that the Petitioners should have anticipated that the FCC would grant a waiver to Gannett’s Phoenix combination in the rule making proceeding. See Gannett Opp. at 10. Gannett asserts that it “is not improper or unusual for the Commission to grant waivers or otherwise grandfather certain ventures within the context of a rulemaking proceeding” because “agencies commonly adopt existing operations when making policy change that could significantly affect regulated entities.” Opp. at 8. Gannett cites the 1975 *Order* and two other FCC rule making decisions as examples. Opp. at 8-9 & n.27. However, in each case, the FCC grandfathered pre-existing ownership patterns that had not violated any FCC rules

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<sup>7</sup> A copy is attached.

<sup>8</sup> It is unclear whether Petitioner could have, as Gannett suggests, filed a petition for reconsideration of the Media Bureau’s grant of the renewal application. See 47 CFR § 1.106 (requiring showing of good cause). But even if they could, Gannett cites no reason why seeking reconsideration of the Bureau Order should be the exclusive remedy here. Indeed, because only the Commission, not the Media Bureau, can reverse the waiver, it would be inefficient and a waste of resources to have to file with the Media Bureau only to have the petition denied due to lack of authority and then have to file an application for review to the Commission.

before the rule was amended in those proceedings.<sup>9</sup> By contrast, Gannett's and Media General's combinations, created in acquisitions subsequent to the last renewal, came into violation of the former NBCO rule upon expiration of their license renewals. Thus, while some Petitioners opposed the relaxation of NBCO rule in the rule making, they did not specifically oppose the grant of these waivers since they could not have anticipated that the FCC would grant waivers for combinations that violated both the former and the amended NBCO rule.<sup>10</sup>

## **II. The FCC Must Provide For Enhanced Public Notice In This Proceeding**

The NAB argues that the FCC should deny requests for enhanced public notice because it "already addressed" public notice in the *Order* and/or because other FCC proceedings deal with public notice. Opp. at 7. However, the FCC did not adequately address our arguments concerning notice in the order. Indeed, the insufficiency of the FCC's notice is illustrated by the Gannett example discussed above and cannot be remedied simply by the FCC's promise to post public notice of waiver requests. *Order* at ¶79. Moreover, it would not serve the public interest to allow the new presumptive waiver process to take effect before the FCC has in place public notice requirements that actually facilitate reaching regular viewers and listeners.

## **III. The FCC Can And Should Require Broadcasters That Acquire A Co-Located Daily Newspaper To Apply For A Waiver Within One Month**

Several parties oppose our recommendation that broadcasters apply for a waiver within one month of acquiring a co-located daily newspaper. Their oppositions misleadingly suggest

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<sup>9</sup> Gannett also cites *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd. 12903 (1999); and *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd. 12559 (1999).

<sup>10</sup> The dissenting Commissioners themselves had not anticipated that the FCC would be granting waivers in the *Order*. See *Order* at 107 (*Dissenting Statement of Commissioner Michael J. Copps*); *id.* at 115 (*Dissenting Statement of Commission Jonathan S. Adelstein*). Indeed, since both Gannett and Media General had pending applications, the natural assumption would be that the FCC would address the waiver requests in those licensing proceedings.

that the FCC lacks statutory authority to impose such an obligation at any time but renewal. *See, e.g.,* Fox Opp. at 3; NAB Opp. at 6. However, the Communications Act clearly permits license terms of less than the full eight years. 47 U.S.C. § 307(c)(1). Moreover, the FCC can compel early renewal: “Whenever the FCC regards an application for renewal of a license as essential to the proper conduct of a hearing or investigation, and specifically directs that it be filed by a date certain, such application shall be filed within the time thus specified.” 47 C.F.R. § 73.3540. The FCC has exercised its authority to request early license renewals. *See, e.g., Letter to Greater Portland Broadcasting Corp.*, 3 FCC Rcd. 1953, 1954 (1988); *Application of WWOR-TV, Inc.*, 6 FCC Rcd. 6569 (1991). Thus, the FCC has authority to adopt this proposal.<sup>11</sup>

#### **IV. Broadcasters’ Oppositions Provide Further Support That The FCC Should Tighten The Television Duopoly Rule**

In opposing our argument that allowing television duopolies is no longer necessary because digital television stations can multicast, NAB argues that “many broadcasters have indicated that they will not even invest in developing additional digital programming for multicast channels if those streams are not carried by cable.” Opp. at 11. Given all of the expenses undertaken by consumers to buy new digital television sets and/or converter boxes, it would be devastating if at the end of the DTV transition, the public ends up with little more local service than they have today. Limiting television owners to one station per market would increase incentives to multicast and to produce quality programming so that cable systems will want to carry it.

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<sup>11</sup> Several broadcasters misconstrue “footnote 25” as a mechanism by which they are afforded an opportunity to prove that their cross-ownerships are in the public interest. Tribune Opp. at 4; Fox Opp. at 4. This was not the FCC’s intention in the 1975 *Order*. Instead, the order sought to prevent the harms caused by divestiture to entities that were created prior to any type of cross-ownership regulation. 1975 *Order*, 2d R&O, 50 FCC 2d 1046,1047.

## CONCLUSION

For the foregoing reasons, the FCC should ignore broadcasters' self-interested arguments and revise the *Order* as detailed in our petition for reconsideration.

Respectfully Submitted,

*/s/ Angela J. Campbell*

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May 16, 2008

# PUBLIC NOTICE

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REPORT NO. 26249

## Broadcast Applications

6/5/2006

STATE FILE NUMBER      E/P CALL LETTERS      APPLICANT AND LOCATION      NATURE OF APPLICATION

### AM STATION APPLICATIONS FOR AMENDMENT RECEIVED

NY	BR-20060201AFR	WABC 70658	WABC-AM RADIO, INC.	Amendment filed 05/31/2006
	E	770 KHZ	NY, NEW YORK	

### FM TRANSLATOR APPLICATIONS FOR AMENDMENT RECEIVED

PA	BLFT-20060412AAJ	W291AP 65180	TEMPLE UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER ED	Engineering Amendment filed 05/31/2006
	E	106.1 MHZ	PA, SCRANTON	

### TELEVISION APPLICATIONS FOR AMENDMENT RECEIVED

NE	BRCT-20060201BAI	KSTF 63182	SAGAMOREHILL BROADCASTING OF WYOMING/NORTHERN COLORADO, LLC	Amendment filed 05/31/2006
	E	CHAN-10	NE, SCOTTSBLUFF	

### FM STATION APPLICATIONS FOR ASSIGNMENT OF LICENSE ACCEPTED FOR FILING

TX	BALED-20060531ADQ	KTAA 1247	INSTITUTE IN BASIC LIFE PRINCIPLES, INC.	Voluntary Assignment of License From: INSTITUTE IN BASIC LIFE PRINCIPLES, INC. To: COMMUNITY BROADCASTING, INC. Form 314
	E	90.7 MHZ	TX, BIG SANDY	

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REPORT NO. 26249

## Broadcast Applications

6/5/2006

STATE FILE NUMBER      E/P CALL LETTERS      APPLICANT AND LOCATION      NATURE OF APPLICATION

### LOW POWER FM APPLICATIONS FOR RENEWAL ACCEPTED FOR FILING

CA	BRL-20060531ADX	KFOK-LP E 124842 95.1 MHZ	AMERICAN RIVER FOLK SOCIETY CA , GEORGETOWN	Renewal of License.
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### TELEVISION APPLICATIONS FOR RENEWAL ACCEPTED FOR FILING

ID	BRCT-20060531ABW	KIDA 81570 E CHAN-5	MARCIA T. TURNER D/B/A TURNER ENTERPRISES ID , SUN VALLEY	Renewal of License.
AZ	BRCT-20060531ACB	KPNX 35486 E CHAN-12	MULTIMEDIA HOLDINGS CORPORATION AZ , MESA	Renewal of License.
UT	BRCT-20060531AFI	KUTF 69694 E CHAN-12	LOGAN 12, INC. UT , LOGAN	Renewal of License.
NM	BRCT-20060531AGB	KNAT-TV 993 E CHAN-23	TRINITY BROADCASTING NETWORK NM , ALBUQUERQUE	Renewal of License.

## CERTIFICATE OF SERVICE

I, Jessica J. Gonzalez, hereby certify that on this 16<sup>th</sup> day of May, 2008, the foregoing Reply was served by first-class mail, postage paid, on the following:

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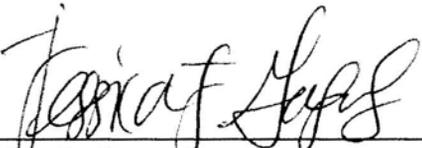
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