

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
2006 Quadrennial Regulatory Review –)	MB Docket No. 06-121
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
2002 Biennial Regulatory Review – Review)	MB Docket No. 02-277
of the Commission’s Broadcast Ownership)	
Rules and Other Rules Adopted Pursuant to)	
Section 202 of the Telecommunications Act)	
of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in)	
Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244
)	
Ways to Further Section 257 Mandate to)	MB Docket No. 04-228
Build on Earlier Studies)	
)	
Public Interest Obligations of TV Broadcast)	MM Docket No. 99-360
Licensees)	

OPPOSITION TO MEDIA PARTIES’ “MOTION FOR EXTENSION OF TIME”

Media Alliance, Free Press, the Office of Communication of United Church of Christ, Inc., and Prometheus Radio Project (collectively, “Citizen Parties”), by their attorneys at the Institute for Public Representation and the Media Access Project, hereby oppose the “Motion for Extension of Time” filed by Cox Enterprises, Inc., Calvary, Inc., Bonneville Holding Company, Scranton-Times, L.P., and Morris Communications Company, LLC (collectively, the “Media

Parties”).¹ The Media Parties ask the Federal Communications Commission (“FCC” or “Commission”) to postpone submission deadlines and delay review of Media Parties’ long-overdue newspaper-broadcast cross-ownership (“NBCO”) rule waiver requests until the conclusion of any litigation associated with the NBCO rulemaking.² Section 405 of the Communications Act forecloses the Commission from acting on Media Parties’ request because it is actually an untimely-filed petition for reconsideration of an explicit Commission decision in the 2006 Quadrennial Regulatory Review Order.³ Moreover, extension of the deadline would violate Section 309(a) of the Communications Act insofar as it would impair the licensing process in serving the public interest in diversity, competition, and localism.⁴ Instead of further extending Media Parties’ filing deadlines, the Commission should require licensees to file their waiver requests immediately so that the Commission may evaluate them under the current rule.

BACKGROUND

I. Review Of The Commission’s Ownership Rules

In 1975, the Commission found that grant of a broadcast station license to an applicant that operated a daily newspaper “in the same city as that in which the paper is published is not going to add to already existing choices, and is not going to enhance diversity.”⁵ It therefore banned one entity from owning a broadcast station and a newspaper in the same designated

¹ Cox Enterprises, Inc., *et al.*, Motion for Extension of Time, filed in MB Dkt. 06-121 (Oct. 1, 2008) (“Media Parties’ Motion”).

² Media Parties’ Motion at 2.

³ 2006 Quadrennial Regulatory Review, Order, 23 FCC Rcd. 2010 (2008) (“2008 Order”).

⁴ See 47 U.S.C. § 309 (2008) (providing that the Commission shall only grant license applications that would serve “the public interest, convenience and necessity.”).

⁵ 1975 Report and Order, 50 FCC 2d 1046, 1075 (1975), *aff’d sub nom. FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (“1975 Order”).

market area, except in very limited situations.⁶ In 1996, Congress enacted Section 202(h) of the Telecommunications Act, which requires the Commission to review its ownership rules every four years and repeal or modify any regulation that it determines to no longer be in the public interest.⁷ In 2003, the Commission repealed the NBCO rule and implemented cross-media limits in its place.⁸ Both broadcasters and the public challenged the *2003 Order* in *Prometheus Radio Project v. FCC*.⁹ The *Prometheus* court rejected the *2003 Order*, remanded it to the Commission, and stayed the rule changes pending its review of the Commission's remand order.¹⁰ Because the Commission had yet to act on remand in 2006 when the next quadrennial review arose, it merged the remand proceeding with the Congressionally-mandated 2006 Quadrennial Review.

These merged proceedings culminated in the *2008 Order*. Discussion of the various rules in the *2008 Order* spans almost 124 pages, and the FCC analogizes 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” and decided whether to grandfather existing cross-owned combinations.¹¹ The *2008 Order* relaxes the 1975 NBCO rule. If the Third Circuit affirms the

⁶ *Id.* at 1090 & app. F.

⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56,111-12 (codified at 47 C.F.R. § 303 note (2006)).

⁸ *2002 Biennial Regulatory Review*, Order, 18 FCC Rcd. 13,620, 13,622-23 (2003) (“*2003 Order*”).

⁹ 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

¹⁰ *Id.* at 382.

¹¹ *2008 Order* at 2054 (emphasis added). In reviewing the FCC's *1975 Order*, both the D.C. Circuit and the Supreme Court viewed the decision as a rulemaking decision, even the section that grandfathered the newspaper-broadcast combinations. *Nat'l Citizens Committee for Broad. (NCCB) v. FCC*, 555 F.2d 938, 965-966 (D.C. Cir. 1977); *FCC v. NCCB*, 436 U.S. 775, 777

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relaxed rule,¹² it will create a rebuttable presumption that combinations in the top-twenty designated market areas are in the public interest if the television station is not ranked among the top four stations and at least eight independent “major media voices” remain post-merger.¹³ All other combinations will be presumed contrary to the public interest unless the licensee overcomes an extremely “high hurdle” to show otherwise, by demonstrating that very specific factors weigh in favor of the public interest.¹⁴

In paragraph 77, the *2008 Order* grandfathers five “combinations of a newspaper and a single broadcast station that were formed by acquisitions occurring after the date of the broadcast station’s last renewal because [the FCC found] that the public interest would be served by such waivers.”¹⁵ In doing so, the Commission addresses the particular facts surrounding each combination to determine whether the cross-owned entities would serve the public interest.¹⁶

In paragraph 78, the Commission specifically refuses to grandfather waivers of the Media Parties’ stations at issue in this proceeding because it finds that each of those “combinations involves multiple newspapers and/or multiple broadcast stations” and thus “raise heightened diversity concerns.”¹⁷ The Commission finds that “it would be inappropriate to grant these requests or grandfather these combinations across-the-board” and offers that it instead intends to “examine them on a case-by-case basis.”¹⁸ To facilitate a case-by-case analysis, the Commission

(footnote continued)

(1978). In fact, the D.C. Circuit referred to the parties as petitioners and respondents, not appellants and appellees. *NCCB*, 555 F.2d at 938.

¹² *Prometheus*, 373 F.3d at 382 (“[w]e stayed implementation of the rules pending our review.”).

¹³ *2008 Order* at 2040.

¹⁴ *Id.* at 2049.

¹⁵ *Id.* at 2055-56.

¹⁶ *Id.* at nn. 2052-56.

¹⁷ *Id.* at 2056-57.

¹⁸ *Id.*

provides that “[w]here a pending waiver request involves a specific combination consisting of more than one newspaper and/or more than one broadcast station¹⁹ or an entity has been granted a waiver to hold such a combination pending the completion of this rulemaking,²⁰ *we will afford the licensee 90 days after the effective date of this order to either amend its waiver/renewal request or file a request for permanent waiver.*”²¹ The Commission further provides that it will hold pending waiver requests and renewal applications in abeyance pending its receipt of an appropriate amendment.²² It also declares that any temporary waivers granted pending completion of the rulemaking will be temporarily extended until the Commission acts on requests for permanent waivers filed within the time period specified.²³

The Commission released the *2008 Order* on February 2, 2008 and it was published in the Federal Register on February 21, 2008. Petitions for reconsideration of the *2008 Order* were due on March 24, 2008. The Media Parties did not file for reconsideration. The *2008 Order* technically “became effective” on July 9, 2008²⁴ when it was approved by the Office of Management and Budget. However, because the Third Circuit stayed the Commission’s ownership rules pending its review of the remand order, the new rule is **not** the operative law

¹⁹ In a footnote elaborating on these combinations, the Commission provides that it is “aware of the following waiver/renewal applicants with existing combinations that fall into this category: Cox Enterprises, Inc. (Atlanta, Georgia, and Dayton, Ohio DMAs); Tribune-Review Publishing Co. (Pittsburgh, Pennsylvania DMA); Bonneville International Corp. (Salt Lake City, Utah DMA); and Scranton Times Ltd. Partnership (Wilkes Barre-Scranton, Pennsylvania DMA).” *2008 Order* at n.257.

²⁰ In a footnote, the Commission observes that “Morris falls into this category with regard to its newspaper/broadcast combinations in the Amarillo, Texas, and Topeka, Kansas, DMAs.” *2008 Order* at n.258.

²¹ *2008 Order* at 2056-57. (emphasis added).

²² *Id.*

²³ *Id.*

²⁴ *2006 Quadrennial Regulatory Review*, 73 Fed. Reg. 39269 (July 9, 2008) (to be codified at 47 C.F.R pt. 73) (announcing effective date of the rule).

unless, and until, the Third Circuit approves it.²⁵ In the *2008 Order*, the Commission specifically provides that the “deadline for filing requests for permanent waivers or amendments to waiver requests or renewal applications [is] October 7, 2008.”²⁶

II. The Media Parties’ “Motion For Extension Of Time”

Instead of following the Commission’s order to file requests for permanent waivers or amend waiver requests or renewal applications, on September 30, 2008 the Media Parties filed a “Motion for Extension of Time”²⁷ in the Bureau-level licensing proceedings. The filing was not submitted in the ownership rulemaking docket, MB 06-121, until a day later, apparently after Commission staff urged counsel to file Media Parties’ request in that docket.²⁸ The Media Parties ask for the Commission to grant an “extension of the deadline until ninety days after issuance of a final court order on pending judicial challenges to the recently reformulated NBCO rule.”²⁹ They also ask the Commission for a “thirty-day extension of the October 7, 2008 deadline to allow the Commission to act on this request.”³⁰

The Media Parties insist that this further delay is necessary because the filings require the Media Parties to perform factual analyses and to collect data, and because the pending litigation over the *2008 Order* – in which four of the five Media Parties are participating – makes it

²⁵ *Prometheus*, 373 F.3d at 382.

²⁶ Media Bureau Order, *2006 Quadrennial Regulatory Review*, MB Dkt. 06-121 (Oct. 7, 2008) (“Bureau Order”).

²⁷ Media Parties’ Motion (filed in the licensing dockets on Sept. 30, 2008).

²⁸ The letter attached to the filing provides that “[a]t the request of the Commission staff, I attach for inclusion ... a copy of the ‘Motion for Extension of Time’ that was filed yesterday.” Letter from Anne Swanson to the Media Bureau filed on behalf of Media Parties’, MB Dkt 06-121 (Oct. 1, 2008) (“Media Parties’ Letter”).

²⁹ Media Parties’ Motion at 2

³⁰ *Id.*

uncertain which criteria the Commission will use to conduct its waiver analyses.³¹ They further assert that “any waiver decisions the Commission makes prior to a court determination, if it requires the parties to meet the October 7, 2008 deadline, stand a high probability of requiring modification if even minor changes are made to the relevant standards and criteria on appeal.”³² They thus conclude that “fundamental fairness and administrative efficiency strongly suggest it would be prudent to delay action on the amended waiver requests until after court review is complete” and that the extension would “simply preserve the *status quo*.”³³ Finally, the Media Parties assert that “no public interest benefit would be advanced by requiring the submission of waiver showings prior to court direction” and that their resources would be better spent “*implementing* localism initiatives.”³⁴

On October 7, 2008, the Media Bureau granted the Media Parties’ request to “extend the filing deadline until November 7, 2008 for the Media Parties to file amendments or revised waiver requests.”³⁵ The Bureau specifically noted that the order “does not constitute action on the Media Parties’ request to further extend the deadline,” and provided that the full Commission would consider that request.³⁶

III. The Media Parties’ Violating Entities

All of the Media Parties own multiple newspapers and/or broadcast stations in the same designated market areas, and none have obtained NBCO rule waivers. The Media Parties bought these combinations after 1975, and knew that they violated the NBCO rule at the time of

³¹ *Id.* at 3.

³² *Id.* at 4.

³³ *Id.*

³⁴ *Id.* at 4-5 (emphasis added).

³⁵ Bureau Order at 4.

³⁶ *Id.*

purchase. Yet instead of divesting, as the NBCO rule requires, the Media Parties rolled the dice on the ownership rule review process, gambling that the Commission would eliminate all ownership restrictions. This gamble failed when the Third Circuit reversed the *2003 Order* and the *1975 Rule* remained in effect. In the meantime, the Commission has allowed the Media Parties' combinations to linger for many years,³⁷ failing to make the legally-required substantive determinations of whether the combinations serve the public interest.

The Commission's failure to act is exacerbated by the lack of transparency in the Media Parties' license renewal applications. The license renewal application form contains a question that specifically asks applicants to disclose whether they have an interest in a daily newspaper in the same area as the broadcast station. The applicant is asked to check either "yes" or "no." Every single license renewal application filed by the Media parties leaves this question blank.³⁸ Had the Media Parties checked "yes," they would have automatically been directed to file an explanation of their cross-ownership status in "Exhibit 14." But because they instead chose to leave this question blank, the public is deprived of information about the Media Parties' ownership status.³⁹ These omissions, combined with the inconsistent and unreliable CDBS filing

³⁷ Calvary, Inc. has had ownership interests in KQV and the Pittsburgh Tribune-Review since 1992. A waiver request was filed in 1998, the end of the license term for KQV, and was supplemented in 2000, 2005, and 2006. This waiver is still pending at the FCC.

Bonneville took control of KSL, KRSP, and KSFI at the end of 2003. In Atlanta, Cox has held WALR, WSRV, and the Atlantic Journal-Constitution since it combined the Atlantic and the Journal into one paper in 2001. Morris has owned the Amarillo News and KGNC, both AM and FM, since 1996.

³⁸ See e.g., App. A. The Media Parties' applications are otherwise thoroughly filled out, indicating that these across-the-board omissions were intentional, and raising a substantial question as to whether Media Parties' omitted these answers in bad faith.

³⁹ Additionally, Morris, Bonneville, and Cox have all failed to adequately maintain their public file pursuant to 47 C.F.R. 73.3526 or 73.3527. To their credit these Media Parties have admitted as much on their license renewal applications. The FCC, however, has refused to address these deficiencies.

system, have severely hindered Citizen Parties' ability to discover the facts underlying Media Parties' existing combinations.

ARGUMENT

The *2008 Order* provides that the Media Parties must modify their waiver requests ninety days after the effective date of the order, in this case, October 7, 2008. The Commission should refuse to further extend the Media Parties' waiver requests through the conclusion of court deliberations on the order. Instead, the Commission should apply the cross-ownership rule as it stood at the time that the licenses expired – not a rule that may or may not be enacted at some time in the future. If the Commission applies the current rule, extensions until the end of the litigation would be unnecessary.

Pursuant to Section 405 of the Communications Act, the Commission must deny the Media Parties' Motion because it is an untimely petition for reconsideration of the *2008 Order*. Even if the Media Parties' Motion request was valid as a matter of law, the Commission should deny it, require the Media Parties to file waiver applications immediately, and evaluate those applications under the *1975 Order*. To do otherwise would harm the public interest and create uncertainty in the license renewal process.

I. The Media Parties Are Time-Barred From Seeking Reconsideration Of The *2008 Order*

The Media Parties' mischaracterized "Motion for Extension of Time" must be dismissed because it is an untimely filed Petition for Reconsideration of the *2008 Order*. Section 405 of the Communications Act provides that any party aggrieved or whose interests are affected by "an order, decision, report, or action ... taken in any proceeding by the Commission," may petition

for reconsideration to the Commission,⁴⁰ and requires that petitions for reconsideration “be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.”⁴¹ Commission rules define “public notice” in rulemaking proceedings as the date in which the order, decision, report, or action is filed in the Federal Register.⁴²

The Commission has long acknowledged that Section 405 limits “the Commission’s power to consider petitions for reconsideration to those filed within a specific time period.”⁴³ Indeed the Commission has “consistently held that it lacks statutory authority to waive or extend, even by as little as one day, the statutory thirty-day filing period for petitions for

⁴⁰ 47 U.S.C. § 405 (2008). Good reason exists to limit the time in which parties may file petitions for reconsideration. FCC Rule 1.429(e) indicates that after petitions for reconsideration are filed at the Commission they are published in the Federal Register *to give the public notice and an opportunity to oppose*. 47 C.F.R. § 1.429(e) (2007). Moreover, those petitions for reconsideration are also filed in the docket(s) from which the rulemaking stemmed. This procedure enables public participation in the rulemaking process by establishing clear rules so that the public can know where and when to look for petitions for reconsideration. The Media Parties attempted to sidestep this procedure by naming their petition for reconsideration a “Motion for Extension of Time” and filing it in adjudicative dockets that are not readily accessible to the public. If not for the Commission staff’s request that the Media Parties file their document in the appropriate dockets, Citizen Parties would have had no notice of this filing and no opportunity to respond. The adversarial process is designed to ensure that the Commission will address arguments on both sides – if the FCC grants this backdoor petition for reconsideration, it will exclude the public from this important vetting process.

⁴¹ *Id.* The statute also indicates that “[n]o such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission.”

⁴² 47 C.F.R. § 1.429 (2007); 47 C.F.R. § 1.4(b) (2007).

⁴³ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 18 FCC Rcd. 7615 (2003) (“*Pay Phone Reclassification Order*”); *accord Licensees of 21st Century Telesis Joint Venture and 21st Century Bidding Corp.*, 16 FCC Rcd. 17257, 17263 (2001).

reconsideration.”⁴⁴ Whenever the Commission has extended the filing period, absent extraordinary circumstances, the U.S. Court of the Appeals of the D.C. Circuit has found that it acted “beyond its lawful authority.”⁴⁵ The Commission has also refused to review petitions that merely reiterate issues that were well-considered and fairly addressed in their original orders.⁴⁶

The Commission systematically refuses to address untimely petitions to deny that are disguised as other types of filings, because the “statutory deadline for filing reconsideration petitions would be rendered meaningless if it could be circumvented by styling the pleading as” some other type of filing.⁴⁷ The Commission has dismissed a “petition for clarification” as an untimely petition for reconsideration because although the parties “styled their Petition as a petition for clarification, it [was] really a petition for reconsideration” of a rulemaking order.⁴⁸ It also has dismissed an “*ex parte* letter” seeking clarification of an order,⁴⁹ and a “petition for rescission”⁵⁰ when it determined that those filings would operate as petitions for reconsideration. The D.C. Circuit upheld the Commission’s reasoning in *JEM Broadcasting*, when it found that a

⁴⁴ *Pay Phone Reclassification Order*, 18 FCC Rcd. at 7616; *see also*, *Application of Panola Broad. Co. for Renewal of License of Station WBLE*, 68 FCC 2d 533 (1978); *Detroit Edison, Inc. for Authority to Operate a Multiple Address System Station*, 16 FCC Rcd. 5290, 5291-92 (2001).

⁴⁵ *Reuters Limited v. FCC*, 781 F.2d 946, 951-952 (D.C. Cir. 1986).

⁴⁶ *Edward J. Durkin, Esq., Food and Beverage Trades Department, AFL-CIO, Washington, DC*, 47 RR 2d 383 (1980).

⁴⁷ *Pay Phone Reclassification Order*, 18 FCC Rcd. at 7618; *accord* *Ass’n of College and Univ. Telecomm. Adm’rs, Am. Council of Educ., and Nat’l Ass’n of College and Univ. Bus. Officers*, 8 FCC Rcd 1781, 1782 (1993) (“*College & Univ.*”); *Implementation of the Telecommunications Act of 1996*, 14 FCC Rcd 15550, 15631-32 (1999); *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 324 (D.C. Cir. 1994) (“*JEM Broadcasting*”).

⁴⁸ *College & Univ.*, 8 FCC Rcd. at 1782.

⁴⁹ *Implementation of the Telecommunications Act of 1996*, 14 FCC Rcd. at 15632.

⁵⁰ *Pay Phone Reclassification Order*, 18 FCC Rcd. at 7618.

petitioner cannot obtain a “back door” to judicial review by filing a petition for amendment or rescission of regulations after the period for direct review has elapsed.⁵¹

The Media Parties’ Motion is the same type of “back door” filing that the D.C. Circuit cautioned against in *JEM Broadcasting*. In the *2008 Order*, the Commission explicitly stipulated that the Media Parties must amend waiver or renewal requests within 90 days of its effective date. Because the *2008 Order* was issued pursuant to a rulemaking proceeding and was published in the Federal Register on February 21, 2008, petitions for reconsideration were due March 24, 2008, thirty days after Federal Register publication.⁵² Yet the Media Parties filed their Motion on October 1, 2008, more than six months after the due date – none filed within the mandated time frame. The Media Parties’ Motion is nothing more than a request that the Commission revisit its decision in the *2008 Order* that licensees shall have “90 days after the effective date of this order to either amend [their] waiver/renewal request[s] or file a request for permanent waiver.”⁵³ The Commission staff’s request that the Media Parties file their Motion in the ownership rulemaking docket indicates that they, too, believe that Media Parties’ Motion pertains directly to the *2008 Order*.⁵⁴

Moreover, the Media Parties’ Motion merely reiterates matters which were considered and fairly addressed in the *2008 Order*. The Commission’s command to modify requests within ninety days of the “effective date” of the order was deliberate. Given that the Third Circuit specifically demanded to review the case on remand, and even stayed implementation of the

⁵¹ *JEM Broadcasting*, 22 F.3d at 324-25.

⁵² 73 F.R. 9481 (2008).

⁵³ *2008 Order* at 2056.

⁵⁴ See Media Parties’ Letter.

rules pending that review,⁵⁵ the Commission clearly foresaw that litigation was inevitable.⁵⁶ Thus the FCC could have chosen to make the amendments due after the conclusion of any litigation arising from the *2008 Order*, but instead it chose to require the Media Parties to file amendments within ninety days of the effective date of the *2008 Order*. Because the Media Parties blatantly missed their window to file a petition for reconsideration of this decision, they are now barred from seeking alterations to the *2008 Order*.

II. Further Extension Of The Deadline Is Contrary To The Public Interest And Would Create Uncertainty In The License Renewal Process

The Media Parties suggest that the Commission should further delay their amendments to advance “fundamental fairness” and to “preserve the *status quo*.”⁵⁷ They assert that “[n]o public interest benefit would be advanced by requiring the submission of waiver showings prior to court direction” and that their resources would be better spent “*implementing* localism initiatives.”⁵⁸ However, these assertions do not reflect the reality of the current situation and serve only to obfuscate the serious public harms that occur as a result of maintaining the *status quo*. The *status quo* is the Media Parties’ continued violation of a rule designed to prevent media monopolies in local communities. This *status quo* benefits the Media Parties by allowing them to retain their combinations without undergoing the required public interest review. As such, the *status quo* severely harms the public interest, and granting any extension of the deadlines articulated in the *2008 Order* will further exacerbate that harm. The Commission should respect

⁵⁵ *Prometheus*, 373 F.3d at 382.

⁵⁶ The Third Circuit mandate, alone, made the litigation foreseeable, but even absent that order the highly-controversial nature of the ownership proceeding surely alerted the Commission that this case would end up in court.

⁵⁷ Media Parties’ Motion at 4.

⁵⁸ *Id.* at 4-5 (emphasis added).

the settled expectations of all those participating in the rulemaking process and apply the existing law to provide stability to the license renewal process.

A. Extension Of The Media Parties' Deadlines Is Contrary To The Public Interest

The Media Parties' cross-owned properties violate existing FCC rules, and are thus *prima facie* inconsistent with the public interest. The Media Parties' holdings violate the existing cross-ownership ban, and indeed the Commission has recognized that they "raise heightened diversity concerns."⁵⁹ Moreover, Media Parties essentially concede that they currently fail to serve local needs insofar as they indicate in their Motion that they will redirect resources saved by not filing waiver amendments to "*implementing* localism initiatives."⁶⁰ The combinations would neither qualify for a waiver under the current rule, nor a positive presumption under the rule proposed in the *2008 Order*.

A further extension of the deadline would contravene Section 309(a) of the Communications Act⁶¹ insofar as it would allow the Media Parties to prolong their holdings that are *prima facie* harmful to the public interest. Congress enacted Section 309 to require that the Commission only license stations that serve the public interest, convenience, and necessity.⁶² To serve the public interest, it has long been held that the licensing process and ownership rules should promote diversity, localism, and competition.⁶³ As long as the Media Parties' licenses persist, each of the relevant markets will suffer from less diverse and *no* local programming. Moreover, the extension continues to close out new entrants, thereby harming competition. The

⁵⁹ *2008 Order* at 2056.

⁶⁰ Media Parties' Motion at 5 (emphasis added).

⁶¹ 47 USC §309(a) (2008).

⁶² *Id.*

⁶³ *2008 Order* at 2016.

Media Parties have already operated in contravention of the public interest and FCC rules for many years; most of their licenses have long since expired and others still are operating without cross-ownership waivers. At some point these entities must be held accountable to the public by making the showings mandated by FCC rules.

B. Extension Of The Deadline Will Create Uncertainty In The License Renewal Process And Cause Undue Delays

The only logical reason for the Commission to extend Media Parties' deadline is so that it could apply a new, different rule when considering licensees' waiver requests. This course of action would be ill-advised. The Commission should require the Media Parties to file their waiver amendments immediately. The Commission should then apply the current cross-ownership rule and waiver exceptions to the Media Parties' amendments. All of the Media Parties' waivers have been outstanding for some time now; their licenses expired between 2004 and early 2007. Indeed some of those parties have held their combinations in violation of the rules and with no waiver for much longer than the traditional eight-year license term. These delays will only be compounded if the license renewal adjudications are postponed until court review is complete.

If the Commission grants the Media Parties' motion for extension of time it will produce unnecessary uncertainty in the license renewal process. The Third Circuit explicitly stayed the *2003 Order* and stated that the stay would remain in effect until the Commission's actions on remand were reviewed, leaving in place the *1975 Rule*.⁶⁴ At no point has there been confusion or ambiguity about which ownership rules are applicable. The same ownership rules that existed at the time the Media Parties filed their waiver requests apply today. Courts have noted that if no

⁶⁴ *Prometheus*, 373 F.3d at 382.

party to a transaction could have known that established law might change then it would be manifestly unjust to subject them to new law that could not be predicted at the time of the transaction.⁶⁵ Consequently, the DC Circuit has ruled that when it is uncertain whether established law might change, parties acting in defiance of the well-established law do so at their own peril.⁶⁶ Similarly, the Supreme Court, in *Landgraf v. USI Film Products*, warns that, “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”⁶⁷

To apply a rule that does not yet exist is not only antithetical to basic legal precepts, it will create uncertainty where none previously existed. To delay the required showings, on the grounds that the law may eventually change in some manner, would be unwarranted and contrary to law. The Commission has an established process for reviewing waiver requests and that process should apply until a new process is adopted. As Media Parties themselves suggest, it is unclear whether the *2008 Order* will be upheld. The same was true in the 1998, 2000, and 2002 ownership reviews, and it seems likely that this may well be the case again. In the meantime, the Commission must act on waiver requests in a more timely fashion so that licensees can have some certainty about how they should proceed and so that the public may meaningfully participate in the license renewal process.⁶⁸

⁶⁵ *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102-03 (D.C. Cir. 2001).

⁶⁶ *Id.* at 1102.

⁶⁷ 511 U.S. 244, 265 (1994).

⁶⁸ Delaying the license renewal process every time ownership rulemaking or litigation is in progress would create an unmanageable process. Review of the ownership rules happens every four years. In the past it has taken the Commission almost four years to conclude ownership rulemakings. For instance, in the 2002 Biennial Review the Commission sought and received comment in 2002 and issued an order in 2003. The court review did not conclude until 2004.

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Extension of this deadline will create a slippery slope of agency delay. The FCC must approve the transfer or renewal of broadcast licenses, but has no authority over newspaper acquisitions. The NBCO rule provides that where an existing licensee subsequently purchases a newspaper, it has up to one year or the end of the license term, whichever is later, to come into compliance with the rule.⁶⁹ The broadcast license term was extended to eight years in 1996.⁷⁰ And so, a broadcast licensee can acquire a newspaper in the same community and operate both for a substantial period of time. This problem is exacerbated when adjudicatory review of these combinations is further delayed until the conclusion of a proposed rulemaking.⁷¹ Cox's ownership of WALR illustrates how making a waiver request's adjudicatory review contingent on a rulemaking is likely to result in egregious, inefficient, and avoidable delays.

The FCC granted Cox a temporary waiver in March of 1997 that allowed Cox to purchase WALR (FM).⁷² The FCC stated that the temporary waiver pending its resolution of the

(footnote continued)

Then some of the broadcasters sought certiorari in the Supreme Court, which was denied almost a year later. By the time the Commission got around to responding to the Third Circuit's remand order it was 2006, and the Commission combined the remand process with the quadrennial review process. Meanwhile, licenses come up for renewal every eight years, in different time intervals depending on the state of license. If licensees are allowed to cherry pick the rule that should apply to their requests, the Commission will constantly be postponing or expediting waiver decisions. The practical effect is that licensees keep their licenses much longer than Congress intended when enacting the maximum eight-year license term, 47 U.S.C. § 307(c) (2008), even if those licensees are failing to serve the public interest. This nullifies the intent and purpose of the license renewal process. 47 U.S.C. § 309(a) (2008).

⁶⁹ *1975 Order*, 50 FCC 2d at 1076, n.25.

⁷⁰ 47 U.S.C. § 307(c) (2008).

⁷¹ If the Commission sets a precedent for postponing waiver requests until the conclusion of ownership rulemaking litigation, it likely will be faced with unintended consequences. Such precedent would create a perverse incentive for broadcasters to appeal ownership rulemaking decisions for the sole purpose of prolonging their violating combinations.

⁷² *New City Commc'ns, Inc.*, 12 FCC Rcd 3929 (1997).

issues raised in the broadcast ownership rulemaking was justified.⁷³ Since 1997, Cox has repeatedly updated its waiver request per the Commission's request, however the FCC has yet to review anything, and Cox's combination has avoided scrutiny for more than eleven years. This delay is well beyond the "one year or end of the license term" time frame that that is envisioned in the 1975 Order.⁷⁴ Moreover, during this delay, the public has no way to discover whether the combination is serving the public interest, nor any appropriate avenue to challenge the combination. This pattern of procrastination is entirely avoidable – the FCC can immediately adjudicate waiver requests under the current NBCO rule. Such review places no extra burden on the Media Parties who have been "diligently preparing their submissions,"⁷⁵ and it prevents combinations from indefinitely foregoing public interest scrutiny.

⁷³ *Id.*

⁷⁴ *1975 Order*, 50 FCC 2d at 1076, n.25

⁷⁵ Media Parties' Motion at 3.

CONCLUSION

Wherefore, Citizen Parties request that the Commission deny the Media Parties' Motion and evaluate their combinations under the existing NBCO rule.

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November 5, 2008

Appendix A

Federal Communications Commission Washington, D.C. 20554 <p style="text-align: center;">FCC 303-S</p>	Approved by OMB 3060-0110 (July 2008)	FOR FCC USE ONLY FOR COMMISSION USE ONLY FILE NO. BR - 20050930APS
APPLICATION FOR RENEWAL OF BROADCAST STATION LICENSE Read INSTRUCTIONS Before Filling Out Form		

Section I - General Information- TO BE COMPLETED BY ALL APPLICANTS

1.	Legal Name of the Applicant FM IDAHO CO., LLC					
	Mailing Address 21361 HIGHWAY 30					
	City TWIN FALLS	State or Country (if foreign address) ID				
	Telephone Number (include area code) 2087358300	ZIP Code 83301 -				
	FCC Registration Number: 0010701654	Call Sign KSRV				
		Facility Identifier 35637				
2.	Contact Representative (if other than Applicant) KATHLEEN VICTORY, ESQ.	Firm or Company Name FLETCHER HEALD & HILDRETH, PLC				
	Mailing Address 1300 N. 17TH STREET SUITE 1100					
	City ARLINGTON	State or Country (if foreign address) VA				
	Telephone Number (include area code) 7038120400	Zip Code 22209 - 703				
		E-Mail Address (if available) VICTORY@FHHLAW.COM				
3.	If this application has been submitted without a fee, indicate reason for fee exemption (see 47 C.F.R. Section 1.1114): <input type="radio"/> Governmental Entity <input type="radio"/> Noncommercial Educational Licensee <input type="radio"/> Other <input checked="" type="radio"/> N/A (Fee Required)					
4.	Purpose of Application <input checked="" type="radio"/> Renewal of license <input type="radio"/> Amendment to pending renewal application If an amendment, submit as an exhibit a listing by Section and Item Number the portions of the [Exhibit 1] pending application that are being revised.					
5.	Facility Information: <input checked="" type="radio"/> Commercial <input type="radio"/> Noncommercial Educational					
6.	Service and Community of License a. <input checked="" type="radio"/> AM <input type="radio"/> FM <input type="radio"/> TV <input type="radio"/> FM Translator <input type="radio"/> LPFM <input type="radio"/> TV Translator <input type="radio"/> Low Power TV <input type="radio"/> Class A TV <table border="1" style="width:100%; margin-left: 20px;"> <tr> <td colspan="2" style="text-align: center;">Community of License /Area to be Served</td> </tr> <tr> <td style="width:50%;">City: ONTARIO</td> <td style="width:50%;">State : OR</td> </tr> </table> b. Does this application include one or more FM translator station(s), or TV translator station(s), LPTV station(s), in addition to the station listed in Section I question 1? (The call sign(s) of any associated FM translators, TV translators or LPTVs will be requested in Section V). <input type="radio"/> Yes <input checked="" type="radio"/> No		Community of License /Area to be Served		City: ONTARIO	State : OR
Community of License /Area to be Served						
City: ONTARIO	State : OR					

7. **Other Authorizations.** List call signs, facility identifiers and location(s) of any FM booster or TV booster station(s) for which renewal of license is also requested. [Exhibit 2]

Section II - Legal - TO BE COMPLETED BY ALL APPLICANTS

1.	Certification. Licensee certifies that it has answered each question in this application based on its review of the application instructions and worksheets. Licensee further certifies that where it has made an affirmative certification below, this certification constitutes its representation that the application satisfies each of the pertinent standards and criteria set forth in the application, instructions and worksheets.	<input checked="" type="radio"/> Yes <input type="radio"/> No
2.	Character Issues. Licensee certifies that the neither the licensee nor any party to the application has or has had any interest in, or connection with:	
	a. any broadcast application in any proceeding where character issues were left unresolved or were resolved adversely against the applicant or party to the application; or	<input checked="" type="radio"/> Yes <input type="radio"/> No See Explanation in [Exhibit 3]
	b. any pending broadcast application in which character issues have been raised.	<input checked="" type="radio"/> Yes <input type="radio"/> No See Explanation in [Exhibit 4]
3.	Adverse Findings. Licensee certifies that, with respect to the licensee and each party to the application, no adverse finding has been made, nor has an adverse final action been taken by any court or administrative body in a civil or criminal proceeding brought under the provisions of any laws related to the following: any felony; mass media-related antitrust or unfair competition; fraudulent statements to another governmental unit; or discrimination.	<input checked="" type="radio"/> Yes <input type="radio"/> No See Explanation in [Exhibit 5]
4.	FCC Violations during the Preceding License Term. Licensee certifies that, with respect to the station(s) for which renewal is requested, there have been no violations by the licensee of the Communications Act of 1934, as amended, or the rules or regulations of the Commission during the preceding license term. If No, the licensee must submit an explanatory exhibit providing complete descriptions of all violations.	<input checked="" type="radio"/> Yes <input type="radio"/> No See Explanation in [Exhibit 6]
5.	Alien Ownership and Control. Licensee certifies that it complies with the provisions of Section 310 of the Communications Act of 1934, as amended, relating to interests of aliens and foreign governments.	<input checked="" type="radio"/> Yes <input type="radio"/> No See Explanation in [Exhibit 7]
6.	Anti-Drug Abuse Act Certification. Licensee certifies that neither licensee nor any party to the application is subject to denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862.	<input checked="" type="radio"/> Yes <input type="radio"/> No

I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith. I acknowledge that all certifications and attached Exhibits are considered material representations. I hereby waive any claim to the use of any particular frequency as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and request an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934, as amended.)

Typed or Printed Name of Person Signing WENDELL M. STARKE	Typed or Printed Title of Person Signing MANAGER
Signature	Date 09/30/2005

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this report. We will use the information you provide to determine if the benefit requested is consistent with the public interest. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your request may be referred to the Federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your request may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government, is a party to a proceeding before the body or has an interest in the proceeding. In addition, all information provided in this form will be available for public inspection. If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may also provide this information to these agencies through the matching of computer records when authorized. If you do not provide the information requested on this report, the report may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Your response is required to obtain the requested authority. We have estimated that each response to this collection of information will average 3 hours. Our estimate includes the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PER, Paperwork Reduction Project (3060-0110), Washington, D. C. 20554. We will also accept your comments via the Internet if you send them to Leslie.Smith@fcc.gov. Remember - you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-0110.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1995, P.L. 104-13, OCTOBER 1, 1995, 44 U.S.C. 3507.

Section III - TO BE COMPLETED BY AM and FM LICENSEES ONLY

1.	Biennial Ownership Report: Licensee certifies that the station's Biennial Ownership Report (FCC Form 323 or 323-E) has been filed with the Commission as required by 47 C.F.R. Section 73.3615.	<input checked="" type="radio"/> Yes <input type="radio"/> No See Explanation in [Exhibit 8]
2.	EEO Program: Licensee certifies that:	
a.	The station's Broadcast EEO Program Report (FCC Form 396) has been filed with the Commission, as required by 47 C.F.R. Section 73.2080(f)(1). Specify FCC Form 396 File Number : B396 - 20050930AOM	<input checked="" type="radio"/> Yes <input type="radio"/> No See Explanation in [Exhibit 9]
b.	The station has posted its most recent Broadcast EEO Public File Report on the station's website, as required by 47 C.F.R. Section 73.2080(c)(6).	<input checked="" type="radio"/> Yes <input type="radio"/> No <input type="radio"/> N/A See Explanation in [Exhibit 10]
3.	Local Public File. Licensee certifies that the documentation, required by 47 C.F.R. Section 73.3526 or 73.3527, as applicable, has been placed in the station's public inspection file at the appropriate times.	<input checked="" type="radio"/> Yes <input type="radio"/> No See Explanation in [Exhibit 11]
4.	Discontinued Operations. Licensee certifies that during the preceding license term, the station has not been silent for any consecutive 12-month period.	<input checked="" type="radio"/> Yes <input type="radio"/> No See Explanation in [Exhibit 12]
5.	Silent Station Licensee certifies that the station is currently on the air broadcasting programming intended to be received by the public.	<input checked="" type="radio"/> Yes <input type="radio"/> No
6.	<p>Environmental Effects. Licensee certifies that the specified facility complies with the maximum permissible radio frequency electromagnetic exposure limits for controlled and uncontrolled environments. Unless the licensee can determine compliance through the use of the RF worksheets in the Instructions to this Form, an Exhibit is required.</p> <p>By checking "Yes" above, the licensee also certifies that it, in coordination with other users of the site, will reduce power or cease operation as necessary to protect persons having access to the site, tower, or antenna from radio frequency electromagnetic exposure in excess of FCC guidelines.</p>	<input checked="" type="radio"/> Yes <input type="radio"/> No See Explanation in [Exhibit 13]
7.	Radio/Newspaper Cross-Ownership. Licensee certifies that neither the applicant nor any party	

to this application has an attributable interest in a newspaper which: (1) is published four or more days per week, (2) is in the dominant language in the market, and (3) is published in a community entirely encompassed by:

a.	the 1 mV/m contour of one of the FM station(s)?	<input type="radio"/> Yes <input type="radio"/> No
b.	the 2 mV/m contour of one of the AM station(s)?	<input type="radio"/> Yes <input type="radio"/> No
If No to either Question 7.a or 7.b, has the Commission made a finding pursuant to Section 310 (d) of the Communications Act that the newspaper/broadcast combination is in the public interest?		<input type="radio"/> Yes <input type="radio"/> No See Explanation in [Exhibit 14]

Exhibits
