

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In Re)	
)	
Cox Radio, Inc.)	
WSRV(FM), Gainesville, GA	)	FCC Facility ID No. 59970
WALR-FM, Greenville, GA	)	FCC Facility ID No. 48728
WHIO(AM), Dayton, OH	)	FCC Facility ID No. 14244
WHKO(FM), Dayton, OH	)	FCC Facility ID No. 14245
)	
Miami Valley Broadcasting Corp.)	
WHIO-TV, Dayton, OH	)	FCC Facility ID No. 41458
)	
Calvary, Inc.)	
KQV(AM), Pittsburgh, PA	)	FCC Facility ID No. 8445
)	
Bonneville Holding Company)	
KSL-FM, Midvale, UT	)	FCC Facility ID No. 54156
KRSP-FM, Salt Lake City, UT	)	FCC Facility ID No. 27462
KSFI(FM), Salt Lake City, UT	)	FCC Facility ID No. 60452
)	
The Scranton Times, L.P.)	
WEZX(FM), Scranton, PA	)	FCC Facility ID No. 66364
WQFM(FM), Nanticoke, PA	)	FCC Facility ID No. 66366
WBAX(AM), Wilkes-Barre, PA	)	FCC Facility ID No. 66365
)	
MCC Radio, LLC)	
WIBW(AM), Topeka, KS	)	FCC Facility ID No. 63169
WIBW-FM, Topeka, KS	)	FCC Facility ID No. 63174
KGNC(AM), Amarillo, TX	)	FCC Facility ID No. 63159
KGNC-FM, Amarillo, TX	)	FCC Facility ID No. 63161

**REPLY TO OPPOSITION TO MEDIA PARTIES’
MOTION FOR EXTENSION OF TIME¹**

Cox Enterprises, Inc.; Calvary, Inc.; Bonneville Holding Company; The Scranton Times
L.P.; and Morris Communications Company, LLC (“Media Parties”), by their attorneys and

¹ This pleading is also being submitted in the following dockets: MB Docket No. 06-121, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317, and MM Docket No. 00-244.

pursuant to 47 C.F.R. § 1.45, hereby reply to the “Opposition to Media Parties’ ‘Motion for Extension of Time’” (“Opposition”) filed by Media Alliance; Free Press; the Office of Communication of United Church of Christ, Inc.; and Prometheus Radio Project (“Citizen Parties”) on November 5, 2008. The Opposition objects to the Media Parties’ September 30, 2008 procedural motion (“Motion”) seeking an extension of time for the submissions necessitated by recent changes to the Commission’s newspaper/broadcast cross-ownership rule, 47 C.F.R. § 73.3555(d) (“NBCO Rule”). As described below, the Opposition suffers from numerous procedural infirmities and offers no valid substantive basis to deny any aspect of the Media Parties’ request. The Commission has wide discretion in the context of its waiver processes, and rushed filing and review of such cross-ownership submissions would be unwarranted given pending judicial challenges to the relevant waiver standards and swirling controversy over the recent changes’ effectiveness and timing. Accordingly, the Opposition should be returned without consideration or, if considered, promptly denied.

Background

In its 2006 Quadrennial Regulatory Review decision and implementing order, the Commission directed the Media Parties, by October 7, 2008, to address the effect that recent changes to the NBCO Rule might have on the above-captioned stations’ pending waiver requests or existing waivers.² In the September 30, 2008 Motion, which Citizen Parties now oppose, the Media Parties sought an extension of the deadline until ninety days after issuance of a final court

² 2006 Quadrennial Regulatory Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Order on Reconsideration*, 23 FCC Rcd 2010, ¶ 78 (2007) (“*QRR Decision*”). The paragraph stated that such filings would be due ninety days after the effective date of that aspect of the *QRR Decision*. It became effective on July 9, 2008, and the ninety-day deadline for such submissions fell on October 7, 2008. 2006 Quadrennial Regulatory Review of the

order on pending judicial challenges to the *QRR Decision*. The Media Parties noted that the submissions are highly fact intensive, involve extensive data collection, and may require input from outside experts. The pending court challenges to the *QRR Decision* call into question what factual and data showings the Commission will ultimately require and exactly what criteria it will use to evaluate those submissions. In furtherance of the requested extension, the Media Parties requested a thirty-day extension of the October 7, 2008 deadline to allow the Commission to act on the request.

No party, including notably the Citizen Parties, opposed the Motion prior to October 7, 2008. On that date, the Media Bureau found good cause existed for grant of the Media Parties' request for a thirty-day extension in order to provide a reasonable opportunity for the Commission to consider the Media Parties' accompanying extension request.³

On November 5, 2008, just before expiration of that thirty-day extension period, Citizen Parties filed their Opposition. On November 7, 2008, the Media Bureau, on its own motion, granted an additional thirty-day extension, until December 8, 2008 for the waiver submissions, again in order to give the Commission additional time to consider the Media Parties' alternative request.⁴

Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 73 Fed. Reg. 39,269 (July 9, 2008).

³ 2006 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Order*, DA 08-2223 (rel. Oct. 7, 2008).

⁴ 2006 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Order*, DA 08-2462 (rel. Nov. 7, 2008)

Argument

As the deadline established by the *QRR Decision* for waiver supplements approached, it became clear that evaluation of such factually intensive filings would likely be caught up in the maelstrom of conflicting judicial challenges to the waiver standards established in the *QRR Decision*. To address this concern, the Media Parties filed a simple extension request seeking to defer the filing deadline for the submissions until judicial resolution of the challenges. The extension request did not object to the directive that the Media Parties make such submissions. Rather, it simply sought an extension of time to file them.

Despite the simplicity of this narrow procedural request, Citizen Parties have mischaracterized the Motion. As described below, they have done so in a last-minute, procedurally irregular filing that in itself is sufficient to justify the dismissal of the Opposition. If despite these infirmities, the Commission elects to reach the merits of the Opposition, an examination of the basis for the Motion reveals that it requests an eminently reasonable extension that the Commission should grant.

A. The Commission Should Reject the Opposition Because It Includes Numerous Procedural Deficiencies.

In their Opposition, Citizen Parties make no effort to demonstrate any particular harm that they will suffer if the simple procedural extension is granted and offer no explanation to justify their tardiness and other procedural flaws in the Opposition. The FCC has consistently made clear that the Communications Act and principles of administrative economy and fairness require that parties seeking to raise objections to filings such as the waiver submissions must demonstrate party-in-interest status. The Commission also requires that such parties support their challenges with affidavits or declarations of personal knowledge which demonstrate a local nexus to the relevant station. To meet these standing prerequisites, the objecting party must

establish several points: (i) existing injury-in-fact or, at least, a potential concrete and particularized harm; (ii) a causal link between the relief it opposes and the injury it suffers or will suffer; and (iii) a demonstration that not granting the relief would remedy the injury.⁵

The Citizen Parties have failed to demonstrate any of the required elements. First, Citizen Parties have failed to show any existing injury-in-fact or a potential concrete and particularized harm. Indeed, they set forth absolutely no connection to any of the sixteen stations and the supplements that are being prepared. Second, Citizen Parties proffer no causal link between the relief they oppose and any unidentified injury that they have suffered or will suffer from grant of the extension. They assert no tangible harm that they will experience if the Motion is granted. Finally, Citizen Parties wholly fail to demonstrate that not granting the relief would remedy the unidentified injury. As such, they have no basis upon which to challenge the Motion. For these reasons, the Opposition should be dismissed.

Even if their lack of any standing to challenge the Motion is overlooked, Citizen Parties offer no explanation for their severe tardiness in opposing it. The Media Parties' Motion had been pending for five weeks before Citizen Parties challenged it. When they did oppose it, they made no attempt to comply with the FCC's most basic procedural requirements. Citizen Parties did not effectuate service on any of the stations, their licensees, owners, or counsel in the manner specified in the Commission's rules.⁶ Moreover, their nineteen-page filing lacked a summary and a table of contents as required by the FCC rules applicable to all filings.⁷ These cumulative

⁵ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *MCI Communications Corp, Memorandum Opinion & Order*, 12 FCC Rcd 7790 (1997); *Letter to Timothy K. Brady, Esq., et al. from Peter Doyle, Chief, Audio Division, Media Bureau*, 20 FCC Rcd 11987 (Med. Bur., Aud. Div. 2005).

⁶ 47 C.F.R. § 1.47.

⁷ 47 C.F.R. §§ 1.49(b) and (c).

errors exceed a level the Commission should accommodate and other parties should be required to tolerate. Because of these procedural irregularities, the Opposition should be returned without consideration.⁸

B. The Commission Should Reject the Opposition on the Merits Because the Requested Extension Makes Eminent Sense.

As the courts have recognized, the FCC has wide discretion in the conduct of its waiver processes as they apply to existing cross-ownerships.⁹ That discretion should be exercised to grant the extension on the merits for the following reasons.

First, much of the Citizen Parties' challenge to the Motion actually demonstrates the wisdom of postponing the filing of the Media Parties' waiver submissions. In light of the great resources necessary to prepare and finalize such filings, mandating their submission and review while the parties are before this agency and the court squabbling over the appropriate standard would further waste both governmental and private resources.

In this regard, the existing controversy at the FCC and in the courts over the FCC's adoption of the *QRR Decision* strongly favors an extension because of the effect of that controversy on issues of effectiveness and timing. In another filing, public interest parties have already sought reconsideration of the *QRR Decision*, arguing that the minimally liberalized standards for waivers that the decision grafted onto the NBCO Rule, which it retained contrary to

⁸ *Cf.* Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003, *Order*, DA-819 (Chf., Enf. Bur. 2008) (returning overly long pleading with late filed permission to exceed page limits); Amendment of Sections [sic] 64.72 of the Commission's Rules and Regulations (Third Computer Inquiry), *Order*, 2 FCC Rcd 4211 (Chf., Com. Car. Bur. 1987).

⁹ *FCC v. Nat'l Citizens Committee for Broad.*, 436 U.S. 775, 813-14 ("NCCB"); *Ellis v. Tribune Television Co.*, 443 F.3d 71, 73 (2d Cir. 2006).

its 2003 action, must be made more stringent.¹⁰ At the same time, industry parties have argued at the FCC, in opposing reconsideration requests, and in the courts in appealing and petitioning for review of the *QRR Decision*, that that limited decision did not go far enough in providing the relief required by competitive media markets and constitutional principles.¹¹ Those court challenges were initially all transferred to the Ninth Circuit, which earlier this month transferred them to the Third Circuit.¹² Just last week, two parties asked that some of those cases be returned to the D.C. Circuit.¹³ The question of appropriate standards is far from resolved.

Second, in this case, as discussed in the Motion, postponing the submission of waiver filings until after the legal landscape is clarified would be consistent with the FCC's previous approach at the time the NBCO Rule was initially adopted in January 1975. In that decision, the FCC flagged sixteen cases in which divestiture of existing properties might be appropriate under the newly adopted rule and stated that such divestitures, if they were eventually ordered, would not have to occur until January 1, 1980.¹⁴ Nonetheless, the FCC required affected parties to submit waiver requests within six months of publication of the 1975 decision in the Federal

¹⁰ Petition for Reconsideration of Common Cause *et al.* in MB Docket No. 06-121 at 3-5 (filed Mar. 26, 2008).

¹¹ *See, e.g.*, Opposition to Petition for Reconsideration of Media General, Inc. in MB Docket No. 06-121 at 18-24 (filed May 6, 2008); Petition for Review of Newspaper Association of America ("NAA"), *NAA v. FCC and United States* (D.C. Cir.) (No. 08-1082).

¹² *In re FCC, In the Matter of 2006 Quadrennial Regulatory Review*, RTC No. 95 (J.P.M.L. Mar. 11, 2008); *Media Alliance v. FCC and United States*, Nos. 08-70830 *et al.* (9th Cir. Nov. 4, 2008) (order transferring jurisdiction to United States Court of Appeals for the Third Circuit).

¹³ Joint Motion of the Cox Parties and Media General, Inc. to Transfer Venue to the District of Columbia Circuit, *Media Alliance v. FCC and United States* (3d Cir.) (Nos. 08-4473, 08-4460).

¹⁴ Amendment of Sections 73.34 [sic], 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order*, 50 FCC 2d 1046, 1084-86 (1975) ("*1975 2d R&O*"), *recon.* 53 FCC 2d 589 (1975) ("*1975 Reconsideration Order*"), *modified by Nat'l Citizens Committee for Broad. v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part, rev'd in part, NCCB*, 436 U.S. 775.

Register.¹⁵ On further review, however, the FCC postponed the deadline, stating that “no useful purpose would be served by insisting” that parties comply with the six-month filing deadline. Instead, the FCC determined that waiver requests would be due sixty days after judicial review was complete.¹⁶ As was true in 1975, no purpose would be served by rushed filings and review of the waiver submissions required by paragraph 78 of the *QRR Decision*.

The reasons the Opposition offers for rejecting the extension are meritless and cannot outweigh the significant reasons for granting the extension set forth above and in the Motion. First, Citizen Parties’ argument that an extension is improper seems based, in part, on their wholly mistaken contention that these combinations were improperly formed.¹⁷ Many of the combinations were created when a broadcast licensee acquired a newspaper, a practice permitted under footnote 25 of the *1975 2d R&O* itself and recognized by the Commission as an entirely appropriate mechanism given that the Commission lacks jurisdiction to regulate newspapers.¹⁸ The others also were established pursuant to legitimate FCC actions. Citizen Parties’ predilections cannot retroactively de-legitimize Media Parties’ reliance on established FCC processes and should not affect the Commission’s consideration of the Media Parties’ simple extension of time request.¹⁹

¹⁵ *1975 2d R&O* at 1086.

¹⁶ *1975 Reconsideration Order*, 53 FCC 2d at 594.

¹⁷ *See* Opposition at 13, 15.

¹⁸ *1975 2d R&O*, 50 FCC 2d at 1076, n.25.

¹⁹ In their Opposition, Citizen Parties also attack what they say are “omissions” in the Media Parties’ pending renewal applications because of which “the public is deprived of information about the Media Parties’ ownership status.” Opposition at 8. This argument is patently false. The newspaper cross-ownership certification to which Citizen Parties refer was not included in FCC Form 303-S until July 2008. *See* 73 Fed. Reg. 39,303 (July 2, 2008). Media Parties’ various renewal applications were filed on previous versions of Form 303-S, which did not include a question specifically dealing with the NBCO Rule. It appears that when the Commission implemented the electronic version of the revised Form 303-S, the electronic filing

Second, based on their dislike of the *status quo*, Citizen Parties argue that the extension request is an untimely request for reconsideration. To the contrary, Media Parties' Motion seeks only an extension of time; it does not seek any substantive change in the underlying obligation to file or the rule itself. Citizen Parties' argument, carried to an extreme, could deem any extension request ever filed with the FCC as a request for reconsideration of the order adopting the underlying rule. Moreover, the FCC itself seems to have discounted and rejected this argument by already granting the Media Parties two thirty-day extensions on October 7 and November 7.

Third, Citizen Parties not only argue that the waiver submissions must be filed *post-haste*, but that they must be evaluated under the 1975 Rule's standards and precedents. That request is fundamentally at odds with the fact that, in 2003, the FCC actually repealed the rule and that the Third Circuit affirmed that action.²⁰ In light of that affirmance, rushed application of the 1975 NBCO Rule makes no sense.

For all the reasons set forth in the Motion and this Reply, the Opposition should be returned without consideration, or, if reviewed, it should be denied. The Commission should exercise its discretion and grant the request to avoid a needless waste of both the Commission's

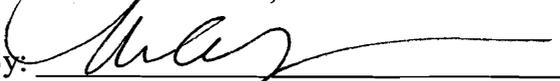
system simply inserted the new question into previously existing electronic versions of the form, leaving the new question blank.

²⁰ See 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, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620 (2003). The Commission concluded that newspaper-broadcast combinations generally "cannot adversely affect competition in any relevant product market," thus making the NBCO Rule no longer necessary to protect competition. *Id.* at 13748-49, 13752,53, 13767. The Commission also held that newspaper-broadcast combinations promote the public interest by delivering more and better local coverage of news and public affairs, and that the NBCO Rule actually inhibits such programming and benefits. *Id.* at 13753-54, 13756-57, 13759-60. Finally, the Commission found that the record in the proceeding did not support the conclusion that "common ownership of broadcast stations and daily newspapers in the same community poses a widespread threat to diversity of viewpoint or programming." *Id.* at 13767. The Third Circuit upheld the

and the Media Parties' resources in evaluating waiver requests under a rule that the Third Circuit has already determined that the Commission properly repealed.

Respectfully submitted,

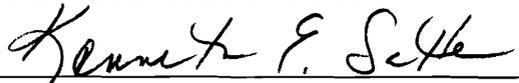
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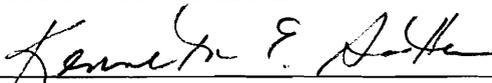
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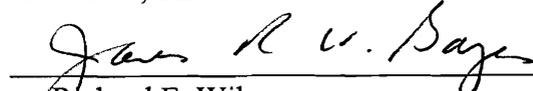
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November 18, 2008

reasonableness of these Commission conclusions. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398-400 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

CERTIFICATE OF SERVICE

I, Tammi Foxwell, a secretary at the law firm of Dow Lohnes PLLC, do hereby certify that on this 18th day of November, 2008, I caused a copy of the foregoing “Reply to Opposition to Media Parties’ Motion for Extension of Time” to be delivered via first-class, prepaid U.S. mail, unless otherwise indicated, to the following:

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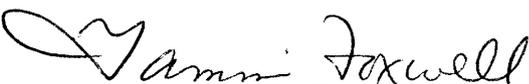
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