

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
Applications of Tribune Company, )  
Debtor-in-Possession, and ) MB Docket No. 10-104  
Licensee Subsidiaries, Debtors-in- )  
Possession, for Consent to )  
Assignment of Broadcast Station )  
Licenses )

**OPPOSITION TO PETITION TO DENY OF  
FREE PRESS, MEDIA ALLIANCE, NABET/CWA, NATIONAL HISPANIC  
MEDIA COALITION, OFFICE OF COMMUNICATION OF THE UNITED  
CHURCH OF CHRIST, INC., AND CHARLES BENTON**

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## SUMMARY

In the Exit Applications, Tribune Company, which is now a debtor-in-possession under the supervision of the federal bankruptcy court, makes a very simple request: it asks the FCC to allow it to emerge from bankruptcy with its assets intact. This relief would represent a preservation of the *status quo* in its various markets. The result would comport fully with the public interest and be consistent with the FCC's policy of affording comity to the bankruptcy process. Tribune's Exit Applications make a very compelling case that they should be granted.

A group of public interest parties ("Petitioners") have filed petitions to deny the Exit Applications because Tribune seeks several media ownership waiver requests. The Petitioners challenge Tribune's request for a permanent waiver of the newspaper/broadcast cross-ownership rule ("NBCO Rule") to permit the continued ownership in Chicago of the *Chicago Tribune*, WGN-TV, and WGN(AM), and, in Hartford, of the *Hartford Courant*, WTIC-TV, and WTXS(TV). They also object to Tribune's request for a permanent waiver of the television duopoly rule to permit the continued cross-ownership of its two television stations in Hartford. (Although Tribune requested NBCO Rule waivers in three other major markets and a "satellite" television exemption in Indiana, Petitioners did not challenge those requests.)

In Chicago, Tribune has owned and operated the three properties for over 60 years – first as grandfathered by the decision adopting the NBCO Rule in 1975 and since 2007 under a permanent waiver granted when the Commission approved a "long form" transfer of Tribune. In that same 2007 decision, the Commission granted a permanent duopoly waiver for the television stations in Hartford on the ground that WTXS(TV) qualifies as a "failing" station. (The Commission had previously granted an identical permanent duopoly waiver to the Hartford combination in 2001.) The Commission's 2007 action also provided conditional NBCO relief in

Hartford, allowing Tribune to hold its stations in common with the *Hartford Courant* for certain periods depending on the outcome of various events. For example, given court challenges to the 2007 decision, Tribune now holds an NBCO waiver in Hartford extending until six months after the conclusion of that litigation.

Since 2007, Tribune has filed for bankruptcy, and the nation has experienced an ongoing recession. At the same time, the newspaper industry has seen a downward financial spiral of historic proportion, and broadcasters' advertising revenues have declined to levels not seen since the last decade. These adverse changes result not just from advertiser cutbacks based on the poor economy but major structural shifts in the media industry as emerging new technologies offer alternatives for both consumers and advertisers.

Despite these downturns, Tribune has consistently delivered the same high quality news, information, and other public service that it has always provided in Chicago and Hartford. In both markets, Tribune's stations and newspapers, through cross-ownership, have been able to ensure that adequate resources are deployed to cover important local events, develop local news and investigatory stories, and deliver enhanced political, election, and sports coverage – while maintaining editorial separation between the broadcast and newspaper properties. Both combinations are news leaders in their markets.

Petitioners cannot deny the exemplary level of service that Tribune delivers in Chicago and Hartford. Instead, they argue with certain aspects of Tribune's showing under the waiver tests that the Commission added to the rule in February 2008. Although the Chicago and Hartford combinations do not qualify for presumptive NBCO waiver relief under these 2008 standards, Tribune has shown that any negative presumption should be reversed in both markets because both combinations qualify as "failed" properties due to Tribune's bankruptcy.

Petitioners, in hyper-technical fashion, argue that voluntary bankruptcies like Tribune's should not count, failing to advance any concrete reason why the Commission or the public interest would be harmed by the result Tribune seeks. Petitioners also argue that the Chicago combination should not be entitled to reversal of any negative presumption on the ground that it offers "substantial" news, contending that the combination has always offered substantial news. Petitioners attempt to limit this factor to properties that only offer news for the first time when they seek waivers runs totally counter to the Commission's interest in fostering localism and diversity.

As an alternative avenue for NBCO relief in both markets, Tribune has shown that the combinations satisfy the four-factor test the *2008 Media Ownership Order* adopted to rebut any presumption against cross-ownership that the Commission might apply. Petitioners quibble with, but do not successfully refute, the strong showing Tribune has made regarding its combinations' increased news, independent news judgment, lack of market concentration, and financial distress. In short, Petitioners have offered no reason that Tribune's permanent waiver in Chicago should not be extended and that its request for similar relief in Hartford should be denied.

Petitioners' attack on the specifics of Tribune's request for an extension of its duopoly waiver in Hartford ignores that the FCC twice has already granted such relief on exactly the same grounds Tribune now asserts. Petitioners offer no independent basis to reach a different result.

The Commission is required to reconcile its policies with those underlying the bankruptcy laws, and maintaining the *status quo* by granting the requested waivers would be consistent with the FCC's long-established and judicially affirmed policy of affording comity to

the bankruptcy process. On numerous occasions, the Commission has previously taken comity into account in granting media ownership waivers to properties involved in court-supervised reorganizations, and Petitioners have shown no reason to depart from this precedent.

Preserving the bankruptcy estate – preserving Tribune’s assets intact – must be a common goal of both the bankruptcy court and this Commission. The exemplary public service delivered by the Chicago and Hartford combinations make that goal easy to achieve under the Communications Act. Particularly in the current economic climate, the public interest would not be served by forcing separation of these distressed properties.

Tribune has made a compelling case that its Chicago and Hartford combinations are entitled to a permanent waiver of the NBCO Rule, its Hartford television stations should receive permanent duopoly relief, and, in this unique set of circumstances, the company should be allowed to sell the properties in tandem. Alternatively, the Commission should grant the combinations a temporary waiver of the NBCO Rule until 18 months after pending proceedings to revise the NBCO Rule become final. In all events, the Petition should be dismissed, and the Exit Applications processed expeditiously and granted once the bankruptcy court issues plan confirmation.

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CHURCH OF CHRIST, INC., AND CHARLES BENTON**

Tribune Company, Debtor-in-Possession (“Tribune”), hereby opposes the Petition To Deny filed by Free Press, Media Alliance, NABET/CWA, National Hispanic Media Coalition, Office of Communication of the United Church of Christ, Inc. (“UCC”), and Charles Benton<sup>1</sup> against the above-captioned applications (the “Exit Applications”) seeking Commission consent to the emergence of Tribune and its debtor-in-possession broadcast licensee subsidiaries from bankruptcy pursuant to the Plan of Reorganization submitted to the United States Bankruptcy Court for the District of Delaware.<sup>2</sup>

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<sup>1</sup> Petition To Deny Applications for Consent to Assignment of Broadcast Licenses of Free Press, Media Alliance, NABET/CWA, National Hispanic Media Coalition, UCC, and Charles Benton (collectively, the “Petitioners”), MB Docket No. 10-104, filed June 14, 2010 (the “Petition”).

<sup>2</sup> See *In re Tribune Company, et al.*, Nos. 08-13141, *et al.* (KJC) (Bankr. D. Del. Filed Dec. 8, 2008).

**I. INTRODUCTION.**

The Exit Applications are part of the reorganization of Tribune and most of its subsidiaries in which, subject to the approval of the bankruptcy court, certain of Tribune's current lenders and bondholders will acquire equity interests and a reorganized Tribune will emerge from bankruptcy and thereafter become a publicly traded company. In connection with the Exit Applications, Tribune seeks permanent waivers of Section 73.3555(d), the newspaper/broadcast cross-ownership rule (the "NBCO Rule"), to permit the continued ownership of newspaper/broadcast combinations in New York, Los Angeles, Chicago, Miami, and Hartford. In addition, Tribune seeks the right to sell the newspaper/broadcast properties in tandem. Alternatively, the Exit Applications seek a temporary waiver of the NBCO Rule until 18 months after pending proceedings to revise the NBCO Rule become final.

The Exit Applications also seek permanent waiver of Section 73.3555(b), the local television ownership or "duopoly" rule, to permit the continued common ownership of WTIC-TV and WTXX(TV) in Hartford, Connecticut.<sup>3</sup> In addition, the Exit Applications request a continued "satellite" exemption from the duopoly rule to permit continued common ownership of WTTK(TV), Kokomo, Indiana, and WTTV(TV), Bloomington, Indiana.

Petitioners raise several procedural objections to the Exit Applications, which as shown below are meritless. Petitioners also challenge the requests for NBCO Rule waivers in Chicago and Hartford and the duopoly waiver request in Hartford with arguments that are equally unavailing. In their Petition to Deny, Petitioners do not challenge any of the other waiver requests.

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<sup>3</sup> WTXX(TV) recently changed its call sign to WCCT-TV. To avoid confusion and maintain consistency with the waiver requests in the Exit Applications, the station is referred to as "WTXX(TV)" throughout this Opposition.

In Chicago, Tribune has owned the *Chicago Tribune*, WGN-TV, and WGN(AM) in common for more than sixty years. Tribune began publishing the *Chicago Tribune* in 1847, signed WGN(AM) on the air in 1924, and launched WGN-TV in 1948. Tribune's Chicago cross-ownership was allowed to continue as a grandfathered combination when the FCC adopted the NBCO Rule in 1975. In the Hartford market, Tribune has owned and operated the *Hartford Courant*, WTIC-TV, and WTXN(TV) in common for a decade. Tribune has held a permanent duopoly waiver since 2001, and, as discussed below, the FCC in the past has acknowledged the additional benefits flowing from cross-ownership of the newspaper and television stations.

In November 2007, the Commission approved a "long form" transfer of control of Tribune from its previous shareholders to Sam Zell, The Tribune Employee Stock Ownership Plan as implemented through the Tribune Employee Stock Ownership Trust, and EGI-TRB, LLC, a decision that Tribune and several petitioners subsequently appealed.<sup>4</sup> In that decision, the Commission found a permanent waiver of the NBCO Rule justified so as to allow the *Chicago Tribune*, WGN-TV, and WGN(AM) combination to continue.<sup>5</sup> On December 8, 2008, Tribune filed a Chapter 11 petition in bankruptcy court in Delaware. *Pro forma* assignment applications, approved by the FCC on December 24, 2008, assigned the licenses for WGN-TV and WGN(AM) to their current licensee, one of the debtor-in-possession licensees specified in the Exit Applications.

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<sup>4</sup> *Shareholders of Tribune Co.*, Memorandum Opinion and Order, 22 FCC Rcd 21,266 (2007) ("2007 Tribune Order"), appeal pending sub nom. *Tribune Co. v. FCC*, Nos. 07-1488, 07-1489 (D.C. Cir. filed Dec. 3, 2007).

<sup>5</sup> *2007 Tribune Order*, 22 FCC Rcd at 21,277-78 (¶ 34).

In the *2007 Tribune Order*, the FCC also granted a permanent waiver of the duopoly rule, finding that WTXN(TV) qualified for the “failing” station exception.<sup>6</sup> The decision noted that a similar permanent waiver had already been granted once before in 2001.<sup>7</sup> The *2007 Tribune Order* provided conditional NBCO relief in Hartford, allowing Tribune to hold its stations in common with the *Hartford Courant* for certain periods of time depending on the outcome of various events.<sup>8</sup> For example, given the current pendency of Tribune’s appellate challenge to the order opposing the transaction, it now holds an NBCO waiver extending until six months after the conclusion of that appellate litigation. In granting this temporary relief in Hartford, the Commission recognized the “unusual and uncertain status of the NBCO [R]ule as well as the harm that applicants would suffer were they forced to divest properties but then win their court challenge.”<sup>9</sup> As in Chicago, the Hartford television stations have gone through the same bankruptcy-related *pro forma* assignment, and the licenses are now held by the debtor-in-possession licensees specified in the Exit Applications.

Since the *2007 Tribune Order*, Tribune has filed for bankruptcy, and the nation has experienced an ongoing recession. At the same time, the newspaper industry has seen a downward financial spiral of historic proportion, and broadcasters’ advertising revenues have declined to levels not seen since the last decade. These adverse changes result not just from advertiser cutbacks based on the poor economy but major structural shifts in the media industry as emerging new technologies offer alternatives for both consumers and advertisers.

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<sup>6</sup> *Id.* at 21,281-82 (¶¶ 44-45).

<sup>7</sup> *Id.* at n.76 (citing *Counterpoint Communications, Inc.*, 16 FCC Rcd 15044 (2001) (“*Counterpoint I*”).

<sup>8</sup> *Id.* at 21,276, 21,278-79 & nn.70, 71, 73, 21,284-85 (¶¶ 30, 36, 58-60).

<sup>9</sup> *Id.* at 21,278 (¶ 36).

Despite these downturns, Tribune has consistently delivered the same high quality news, information, and other public service that it has always provided in Chicago and Hartford. In both markets, Tribune's stations and newspapers, through cross-ownership, have been able to ensure that adequate resources are deployed to cover important local events, develop local news and investigatory stories, and deliver enhanced political, election, and sports coverage – while maintaining editorial separation between and independence of the broadcast stations and newspapers.

For instance, as discussed below and detailed more extensively in the Chicago Waiver Request, WGN-TV, already a market leader in hours of news delivered each week, has increased that total by ten hours per week since 2007. As the Hartford Waiver Request demonstrates, WTIC-TV airs more locally-produced news and public affairs programming than any other station in the market – 35.5 hours per week, a tenfold increase over that aired when Tribune acquired the station in 1997. WTXN(TV), which was not broadcasting local news programming produced by the licensee when Tribune acquired it in 2001, simulcasts WTIC-TV's hour-long 10 p.m. local newscast, airs a daily locally-originated Catholic mass, and offers locally-produced specials.

Petitioners cannot deny the exemplary level of service that Tribune delivers in Chicago and Hartford. Instead, they argue with certain aspects of Tribune's showing under the liberalized waiver tests that the Commission added to the rule in February 2008.<sup>10</sup> Because the combinations each involve more than one broadcast property, they do not qualify for automatic

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<sup>10</sup> 2006 Quadrennial Regulatory Review – Review of the Comm's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, Report and Order and Order on Reconsideration, 23 FCC Rcd 1010, 2040-46, 2047-54 ¶¶ 53-62, 65-75 (2008) (“2008 Media Ownership Order”), appeal pending sub nom. *Prometheus Radio Project v. FCC*, Nos. 08-3078, et al. (3d Cir. filed July 15, 2008).

presumptive waivers under that decision.<sup>11</sup> As this Opposition shows in detail, however, any attempt to deny the Chicago and Hartford combinations a reversal of this presumption on the ground that they are not “failed” is hyper-technical and ignores the seriousness of Tribune’s court-supervised bankruptcy. Petitioners’ contention that the Chicago combination is not entitled to reversal of the presumption because it does not meet the “substantially news” test is equally meritless.

In the alternative, Tribune showed that the combinations in both markets satisfy the four-factor test adopted in the *2008 Media Ownership Order*, to rebut any presumption against cross-ownership that the Commission might apply. Petitioners quibble with, but do not successfully refute, the strong showing Tribune has made regarding its combinations’ increased news, independent news judgment, lack of market concentration, and financial distress. Petitioners’ attack on Tribune’s request for an extension of its duopoly waiver in Hartford ignores that the FCC has twice already granted such relief and offers no independent basis to deny its extension.

The Commission is required to reconcile its policies with those underlying the bankruptcy laws, and maintaining the *status quo* by granting the requested waivers would be consistent with the FCC’s long-established and judicially affirmed policy of affording comity to the bankruptcy process. On numerous occasions, the Commission has previously taken comity into account in granting media ownership waivers to properties involved in court-supervised reorganizations, and Petitioners have shown no reason to depart from this precedent.

Preserving the bankruptcy estate – preserving Tribune’s assets intact – must be a common goal of both the bankruptcy court and this Commission. The exemplary public service

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<sup>11</sup> Because WGN-TV and WTIC-TV are each ranked within the Top 4 stations in their markets and because Hartford is not within the Top 20 DMAs, the Chicago and Hartford combinations do not qualify for a positive presumption under the 2008 standards.

delivered by the Chicago and Hartford combinations make that goal easy to achieve under the Communications Act. The public interest would not be served by forcing separation of these properties.

Tribune has made a compelling case that its Chicago and Hartford combinations are entitled to a permanent waiver of the NBCO Rule, its Hartford television stations should receive permanent duopoly relief, and, in this unique set of circumstances, the company should be allowed to sell the properties in tandem. Alternatively, the Commission should grant the combinations a temporary waiver of the NBCO Rule until 18 months after pending proceedings to revise the NBCO Rule become final. In all events, the Petition should be dismissed.<sup>12</sup>

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<sup>12</sup> Petitioners have also failed to satisfy basic standing requisites. Under the Communications Act, only a "party in interest" has standing to file a petition to deny. 47 U.S.C. § 309(d). Each of the Petitioners has submitted declarations seeking to establish "audience standing" by showing that at least one of its members resides in the service area of one of the broadcast stations at issue in the Exit Applications. *See Chet-5 Broadcasting, L.P.*, 14 FCC Rcd 13041 (1999) (standing accorded to persons who live in a licensee's service area and view or listen to licensee programming). None of the Petitioners, however, alleges facts sufficient to establish standing in all the markets implicated by the Exit Applications. Only one Petitioner has alleged standing in New York (NABET/CWA), Los Angeles (Media Alliance), and Miami (UCC); only two petitioners have alleged standing in Hartford (NABET/CWA and National Hispanic Media Coalition); and four petitioners have alleged standing in Chicago (Free Press, NABET/CWA, NHMC, UCC, and Charles Benton). In the *2007 Tribune Order*, the Commission held that a party's audience standing in one market is insufficient to confer standing on that party to oppose other parts of an application involving markets where the petitioner does not reside. 22 FCC Rcd at 21,269 (¶ 7). Under these circumstances, the Commission should find that each of the Petitioners has standing to file a petition to deny only with respect to those markets where that Petitioner has established audience status. In the markets where a Petitioner has not established standing, that Petitioner's objections should be dismissed, or, at most, treated as informal objections. In addition, to the extent the Petition seeks to raise foreign ownership issues, it should be dismissed because parties alleging standing based on audience membership have no standing to challenge compliance with the Communications Act's foreign ownership limitations. *See Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.3d 73, 79 (D.C. Cir. 1991) ("Though viewers and listeners are among the intended beneficiaries of many Communications Act provisions, they are not the intended beneficiaries of §310(b)").

**II. PETITIONERS' PROCEDURAL ARGUMENTS ARE MISPLACED AND DISREGARD THE BANKRUPTCY PROCESS.**

**A. Petitioners' Call for FCC Action on the Pending Petition for Reconsideration Ignores the Substance of That Filing and the Intervening Bankruptcy.**

In their initial argument, Petitioners urge the FCC to act on the pending reconsideration of the *2007 Tribune Order* filed by Media Alliance and UCC, claiming that such FCC action would result in reversal of that decision leaving “Zell . . . [with] no licenses to transfer to Reorganized Tribune” and “allow[ing] the Commission to recover the licenses and make them available to others.”<sup>13</sup> This suggestion misstates the relief UCC and Media Alliance had sought in their 2007 reconsideration request and flatly ignores the practical effect of Tribune’s intervening 2008 bankruptcy filing and the FCC’s subsequent approval of the *pro forma* assignment of Tribune’s licenses to the debtors-in-possession.

In their 2007 petition for reconsideration, UCC and Media Alliance requested FCC reconsideration of two very precise and limited sub-parts of the *2007 Tribune Order* – the FCC’s denial of standing to UCC and Media Alliance with respect to certain of the 2007 transfer applications and the FCC’s decision to grant a permanent waiver of the NBCO Rule to Tribune’s Chicago media properties.<sup>14</sup> In the 2007 Reconsideration Petition, UCC and Media Alliance did not argue that the *2007 Tribune Order* should be reversed in a manner that, if granted, would strip the transferees of the approval they received in 2007. Petitioners’ assertion that FCC action now on their 2007 Petition would reverse that transfer assumes a predicate that does not exist.<sup>15</sup>

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<sup>13</sup> Petition at 19.

<sup>14</sup> Petition for Reconsideration of UCC and Media Alliance, MB Docket No. 07-119, File Nos. BRCT-20060811ASH, *et al.*, filed Dec. 31, 2007, at 5-20 (“2007 Reconsideration Petition”).

<sup>15</sup> As noted in the transferees’ 2008 opposition to the 2007 Reconsideration Petition, only two introductory references in that petition, which are never developed or supported in the

Moreover, even if the FCC were to overlook this deficiency and infer an argument for reversing the 2007 transfer that UCC and Media Alliance never made, Petitioners now give no valid or sustainable basis for such reversal. Indeed, as the undisputed facts demonstrate, the intervening Tribune bankruptcy has essentially rendered that course moot.

The *2007 Tribune Order* was issued on November 30, 2007. That transaction closed on December 20, 2007. Less than a year later on December 8, 2008, Tribune filed its Chapter 11 petition in bankruptcy court in Delaware and filed *pro forma* assignment applications, as the FCC requires, on December 17, 2008. The FCC approved these applications on December 24, 2008. As a result of these *pro forma* applications and the legal disability the bankruptcy filing caused, the transferees that were approved by the *2007 Tribune Order* are no longer the licensees. The debtors-in-possession now hold the licenses under supervision of the federal bankruptcy court. Any FCC attempt at this late stage to undo the *2007 Tribune Order*, even if possible, may likely be a violation of the “automatic stay” imposed pursuant to 11 U.S.C. § 362

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remainder of the pleading, request in passing reconsideration of the underlying renewal application grants and the FCC’s decision to confer “indefinite” NBCO waivers in New York, Los Angeles, Miami and Hartford. Opposition to Petition for Reconsideration of Samuel Zell, EGI-TRB, L.L.C., and the Tribune Employee Stock Ownership Plan as Implemented through the Tribune Employee Stock Ownership Trust, MB Docket No. 07-119, File Nos. BRCT-20060811ASH, *et. al.*, filed Jan. 15, 2008, at 6 (citing 2007 Reconsideration Petition at 2). These two sentences, however, were never explained or supplemented with any argument supporting them nor explained or addressed in UCC’s and Media Alliance’s subsequent reply in 2008. Neither request addresses reversal of the transfer applications themselves. Even if such a request could be inferred, passing references, made without any support, are insufficient to preserve the argument or permit UCC and Media Alliance to attempt to raise this argument in a different proceeding. “[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” *Coalition on West Valley Nuclear Wastes v. Chu*, 592 F.3d 306, 314 (2d Cir. 2009) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990)); *Borges ex rel. S.M.B.W. v. Serrano-Isern*, 605 F.3d 1, 6 (1st Cir. 2010) (internal citations omitted); *La Quinta Corp. v. Heartland Properties LLC*, 603 F.3d 327 n.5 (6th Cir. 2010) (citations omitted).

at the time Tribune and the other debtors filed for Chapter 11 relief. That stay would prohibit such changes absent extraordinary relief from the bankruptcy court.<sup>16</sup>

In short, Petitioners are now asking for something they never sought, and, even if they had, it is no longer legally or practically possible. For these reasons, Petitioners' request must be soundly rejected.

**B. Petitioners Incorrectly Contend That the Applications Are Incomplete and That Tribune Is Subordinating the Communications Act to the Bankruptcy Code.**

Petitioners make several defective procedural arguments regarding the Exit Applications and the consideration of bankruptcy law. As demonstrated below, each is meritless.

Petitioners contend, but do not develop in any detail, that the Exit Applications are “incomplete” because it is not “clear, nor can it be unless and until the plan of reorganization is approved, who will actually control the licenses.”<sup>17</sup> This argument ignores well established FCC precedent and policy in the processing of applications filed by companies in the process of court-supervised reorganizations. As Tribune demonstrates in the opposition that it is filing today against the Petition To Deny filed by Wilmington Trust, Tribune's Exit Applications provide the information on its post-emergence attributable stockholders required by the Commission's rules and sufficient to ensure compliance with the foreign ownership restrictions.<sup>18</sup> That some 70 percent of Tribune's stock is expected to be in the hands of non-attributable stockholders

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<sup>16</sup> Cf. *LaRose v. FCC*, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974) (acknowledging complications from intervening *pro forma* approvals related to distressed properties).

<sup>17</sup> Petition at 20.

<sup>18</sup> Tribune Company's Opposition to Petition to Deny of Wilmington Trust Company at 5-8, filed Jun. 29, 2010.

following reorganization is neither unusual nor unique.<sup>19</sup> Neither is it a reason to delay processing or to deny the Exit Applications.<sup>20</sup> If changes in stock percentages occur that would require reporting of additional attributable interests, Tribune will amend its applications to reflect the change.<sup>21</sup> The Commission routinely processes and grants applications with stock structures like those the Exit Applications propose,<sup>22</sup> and Petitioners provide no basis for the Commission to find that the Exit Applications are defective.

Equally baseless is Petitioners' contention that Tribune's waiver requests suggest that bankruptcy law principles supplant the need for the Commission to make a public interest review of the applications. This argument is simply a straw man. Tribune has never suggested such primacy for the bankruptcy laws. Its waiver requests repeatedly make reference to the need for the FCC to act in accord with the public interest.<sup>23</sup> At the same time, the waiver requests also explain that prompt FCC approval of the transaction, including the waivers necessary to keep the media combinations intact, is consistent with the FCC's long-standing and judicially affirmed policy of affording comity to the bankruptcy process.

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<sup>19</sup> *Id.* at 7. The Exit Applications point out the possibility that percentage changes in stockholdings may occur because, under ordinary bankruptcy procedures, debt interests in Tribune may be bought, sold, and exchanged during the course of the proceeding. Bankruptcy courts do not impose moratoria on debt trading except for very limited periods or in extraordinary circumstances. *Id.*

<sup>20</sup> For example, in the Citadel Broadcasting bankruptcy, the Commission recently approved a structure for the reorganized company in which no shareholder held an attributable interest in its stock. *Id.* (citing, e.g., Citadel Broadcasting Corporation, Application of Radio License Holding VIII, Debtor-in-Possession, WMAL(AM), FCC File No. BTC-20100318AKG (granted on May 26, 2010)).

<sup>21</sup> *Id.* at 7-8.

<sup>22</sup> *Id.*

<sup>23</sup> *See, e.g.,* Chicago Cross-Ownership Waiver Request at 6, 36, 94-98, 105-108, 130-132.

Relying on this well-established precedent, the waiver requests note that issuance of the waivers will serve the same bankruptcy law objectives that the FCC has concluded are consistent with the public interest.<sup>24</sup> Specifically, the bankruptcy process will provide for equitable distribution among Tribune's creditors; the company is obviously in need of a "fresh start"; and grant of the waivers will, by avoiding the complications and delays inherent in any separation of commonly owned properties, facilitate "the efficient and economical administration" of the bankruptcy case.<sup>25</sup> As the waiver requests demonstrate, their grant will help ensure that, as Tribune emerges from bankruptcy, it will be positioned to maximize its prospects for success in an extremely difficult economic environment. Given the troubled financial status of the media industry, any other outcome would be highly unlikely to result in the same level of public service that Tribune's combined properties currently deliver.

Petitioners' cited cases in fact compel exactly this same result. In both *Telemundo Group, Inc.*<sup>26</sup> and *Fox/WNYW*, the FCC granted media ownership waivers to distressed properties, recognizing the need to afford comity to bankruptcy and reorganization processes as well as the public interest benefits served by allowing distressed combinations to maintain the *status quo* as they emerge from court supervision. Petitioners' statement that the declaratory waiver issued in *Fox/WNYW* was somehow "independent of bankruptcy policy" is flatly at odds with the FCC's and the affirming court's lengthy recitations of the troubled financial history and

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<sup>24</sup> See, e.g., *id.* at 106-107 (citing *Fox Television Stations, Inc.*, 8 FCC Rcd 5341) (granting a permanent waiver of the NBCO Rule to Fox to permit it to continue to hold the license for television station WNYW(TV) following the re-acquisition of the *New York Post* out of bankruptcy)) ("*Fox/WNYW*"), *recon. den.*, 8 FCC Rcd 8744 (1993), *aff'd sub nom. Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995) ("*NAACP*").

<sup>25</sup> E.g., Chicago Cross-Ownership Waiver Request at 107 (citing *Fox/WNYW*, 8 FCC Rcd at 5344 (¶ 15)).

<sup>26</sup> Memorandum Opinion and Order, 10 FCC Rcd 1144 (1994) ("*Telemundo*").

bankrupt filings of the properties at issue.<sup>27</sup> As discussed both below and in detail in the challenged Chicago and Hartford Tribune waiver requests, similar grants are appropriate because they are both consistent with the comity the FCC extends to bankruptcy policy and fully congruent with the public interest as the FCC has interpreted it.

**C. Tribune's Arguments Regarding Industry Financial Problems, Increasing Competition from New Technologies, and Administrative Law and Constitutional Developments All Properly Inform the Waiver Analysis.**

Petitioners seriously misinterpret Tribune's contention (in the Exit Applications) that the media industry's troubled financial condition, emerging competitive developments, and relevant legal standards must guide the FCC's evaluation of the waiver requests. Petitioners contend that these suggestions constitute "attacks on the factual, statutory, and constitutional underpinnings" of the NBCO Rule itself.<sup>28</sup> To the contrary, the extensive factual and legal analyses Tribune presents are essential for the Commission to engage in reasoned decision making and reach an informed determination as to how the Tribune properties have served – and more importantly will continue to serve – the public interest in their respective communities.

Petitioners' contention that many of Tribune's arguments in support of its requested waivers should be disregarded as an inappropriate attack on the NBCO Rule is meritless for several reasons. First, the FCC, courts, and even Petitioners themselves have consistently recognized the availability of waivers of the NBCO Rule.<sup>29</sup> In addressing their availability in

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<sup>27</sup> *Fox/WNYW*, 8 FCC Rcd at 5341-5345 (¶¶ 3-13); *NAACP*, 46 F.3d at 1157-59 (D.C. Cir. 1995).

<sup>28</sup> Petition at 23-26.

<sup>29</sup> *E.g.*, *Multiple Ownership of Standard, FM & Television Broad. Stations*, Second Report and Order, 50 F.C.C.2d 1046, 1085 (¶ 19) (1975) ("1975 Order"), *aff'd FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978) ("NCCB"); *NCCB*, 436 U.S. at nn.9, 11; *NAACP*, 46 F.3d at 1163; Petitioners Opposition to Motion for Partial Lifting of Stay at 9-10, *Prometheus Radio Project v. FCC*, No. 08-3078 (3d Cir. filed Aug. 13, 2004).

particular instances, the FCC has an absolute obligation under bedrock principles of administrative law to consider all relevant matters, including recent factual developments and applicable case law.<sup>30</sup> Tribune's waiver requests simply present factual developments that have occurred since the FCC adopted the latest iteration of the NBCO Rule in the *2008 Media Ownership Order*,<sup>31</sup> with particular focus on facts unique to Tribune and each of its waiver markets, as well as review of applicable law so that the FCC can meet its obligation to engage in reasoned decision making.

Indeed, as the Commission is well aware, several indicia included in its NBCO and duopoly waiver calculus involve consideration of the financial health of the media. For instance, reversal of the negative presumption in the NBCO Rule is available for "failed" and "failing" stations.<sup>32</sup> Among the four factors at issue in rebutting a negative presumption is "financial condition."<sup>33</sup> Not only is Tribune's bankruptcy status relevant on these issues, but consideration of the severe downturn in the financial condition of the newspaper and broadcast industries since these criteria were adopted is necessary to any reasoned evaluation of the factors. The Commission reiterated in 2008 that competition, diversity, and localism guide its implementation

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<sup>30</sup> See, e.g., *Motor Vehicle Mfrs.' Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1989); *Radio-Television News Directors Association and National Association of Broadcasters v. FCC*, 184 F.3d 872, 887 (D.C. Cir. 1999). See also *NBC v. U.S.*, 319 U.S. 190, 225 ("If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.")

<sup>31</sup> See 47 C.F.R. § 73.3555(d); *2008 Media Ownership Order* at 2040-57 (¶¶ 53-79).

<sup>32</sup> 47 C.F.R. § 73.3555(d)(7)(i); *2008 Media Ownership Order*, 23 FCC Rcd at 2047-49 (¶¶ 65-66).

<sup>33</sup> 47 C.F.R. § 73.3555(d)(5)(iv); *2008 Media Ownership Order*, 23 FCC Rcd at 2053-54 (¶¶ 74-75).

of the NBCO Rule.<sup>34</sup> Analysis of Tribune's own financial condition and that of the industry, including the competitive pressure Tribune faces from emerging technologies both in its specific markets and across all markets, is critical to ensuring consistency with these three goals. In the same vein, review of the relevant and applicable statutory and constitutional principles is necessary to ensure reasoned decision making.

Since the Commission reviewed Tribune's 2007 applications and added liberalized waiver standards to the NBCO Rule in early 2008, the newspaper and broadcast industries have experienced some of their worst financial quarters in decades. Petitioners argue that Tribune's descriptions of the financial conditions facing the Chicago and Hartford properties "ignore the significant recovery in the first and second quarters of 2010."<sup>35</sup> Petitioners' own sources, however, present a consistent theme of troubled media conditions that have not improved. While the last several months may have seen very minor "upticks" or minimal improvement in certain categories of advertising spending or revenue, Petitioners' own sources show that media financial performance is still well, well below levels attained before the downturn.

For instance, Petitioners' first cited article, an analysis by SNL Kagan, notes that "TV ad revenue – broadcast and online – will reach \$19.8 billion in 2010, up 14.3% from \$17.3 billion in 2009."<sup>36</sup> The same sentence continues, though, that this 2009 level "was the lowest level since 1995."<sup>37</sup> Similarly, Petitioners' second source, an analysis from *Advertising Age*, repeatedly notes that while the first quarter of 2010 saw slight improvement in certain categories, these

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<sup>34</sup> 2008 Media Ownership Order, 23 FCC Rcd at 2016-17 (¶ 9).

<sup>35</sup> Petition at 23.

<sup>36</sup> SNL Kagan: *TV Ad Rev To Grow 14.3%*, TV NEWSCHECK, June 4, 2010, available at <http://www.tvnewscheck.com/articles/2010/06/14/daily.10/>.

<sup>37</sup> *Id.*

changes were the first “uptick” in four years and fell far short of returning financial performance to pre-downturn levels.<sup>38</sup> For instance, spot TV sales, which the article says “benefited the most,” advanced 22% but “[d]espite that growth, . . . only recovered [their] 1997 level.”<sup>39</sup>

Numerous sectors -- nationally syndicated TV, magazines, newspapers, and outdoor – all showed declines.<sup>40</sup> According to Petitioners’ article, local newspapers, in particular, saw decreased ad spending of 5.6% in 2010’s first quarter, and newspapers overall experienced a 3.7% decline. As the article notes, the gains were, in part, one-time only and idiosyncratic: “some of the gains owed a lot to Olympic ad spending that doesn’t come around often enough.”<sup>41</sup> Overall, the *Advertising Age* article paints a very mixed and troubling picture.

Petitioners’ third source, which reports on the recent “upfront” network advertising market, is also disheartening. It reports that at broadcast “upfronts” earlier this month, advertisers committed \$8.1 to \$8.7 billion to the five broadcast networks, up slightly over the \$7.8 to \$8.1 billion spent in 2009.<sup>42</sup> While the article headlines that the networks “eke[d] out gains over last year,” it concludes that ad levels are still substantially below previous highs:

While both sides of the table nod to this year’s robust activity, there wasn’t enough money in the market to return broadcast TV to levels seen in prior years. In 2008, for example, the five networks were able to secure about \$9.2 billion in upfront commitments, and in 2007 captured commitments totaling \$9.1 billion.

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<sup>38</sup> Nat Ives, *Ad Spending Rebounded in First Quarter for First Gain in Two Years*, ADVERTISING AGE, May 20, 2010, available at [http://adage.com/mediaworks/article?article\\_id=144087](http://adage.com/mediaworks/article?article_id=144087).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Brian Steinberg, *Broadcast Upfront Finishes Between \$8.1B and 8.7B*, ADVERTISING AGE, JUNE 10, 2010, JUNE 10, 2010, available at <http://www.advertising-information.com/TB/?P=11325>.

Clearly, the networks continue to wrangle with eroding ratings and the realization that a screen on a computer or an iPod is just as handy as one built into a TV set.<sup>43</sup>

Petitioners' fourth source, IBA/Kelsey's Local Media Annual Forecast simply projects a very modest and disappointing annual 2.2% increase in growth for an extremely wide range of both traditional and new media sectors.<sup>44</sup> Given this combination, it is unclear whether it even predicts positive growth for traditional media. Moreover, even if the prediction materializes, the anticipated growth will fall far short of returning traditional media's financial performance to pre-downturn levels.

Contrary to Petitioners' contentions, the increasing availability and rapid consumer adoption of new technologies is also highly germane to evaluating Tribune's waiver requests. Tribune's waiver requests present specific market-based data on availability and usage of locally originated Internet news sites in Chicago and Hartford.<sup>45</sup> They also chronicle the competition its properties face across-the-board from the proliferation of new video and text on the Internet.<sup>46</sup> This proliferation provides extensive diversity, and the introduction and rapid adoption of even more new technologies continues apace. As noted in the waiver requests, the WiFi version of Apple's iPad went on sale shortly before the filings.<sup>47</sup> Since the Exit Applications were filed, Apple has begun selling 3G versions of the iPad. The immediate and unprecedented success

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<sup>43</sup> *Id.*

<sup>44</sup> BIA/Kelsey, *BIA/Kelsey's Local Media Annual Forecast – The Big Picture on 'Local'*, <http://www.bia.com/forecasts/>.

<sup>45</sup> Chicago Cross-Ownership Waiver Request at Attachment 8; Hartford Cross-Ownership Waiver Request at Attachment 8.

<sup>46</sup> *See, e.g.*, Chicago Cross-Ownership Waiver Request at 70-89; Hartford Cross-Ownership Waiver Request at Attachment 63-82.

<sup>47</sup> *See, e.g.*, Chicago Cross-Ownership Waiver Request at 89; Hartford Cross-Ownership Waiver Request at 81.

with which these products have met heralds even more diversity as well as more intense competition for audience.<sup>48</sup> The introduction of the iPad alone has brought hundreds of new content options to residents of Tribune's markets, and has prompted the development and release of numerous new "Apps," all of which are relevant to the Commission's review.<sup>49</sup> The fact that the FCC may consider emerging technologies in its 2010 Quadrennial Review and "Future of Media" proceedings<sup>50</sup> does not excuse the agency from considering them in evaluating Tribune's need for waivers to continue the high level of service it provides in its markets.<sup>51</sup>

Second, Petitioners' contention that Tribune's arguments should be disregarded as an inappropriate attack on the NBCO Rule itself is meritless. Tribune's arguments that denial of its waiver requests would violate administrative and constitutional law principles are directly relevant to the review the Commission is required to make of the Exit Applications. The Commission's obligation to ensure its actions are not "arbitrary, capricious, an abuse of

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<sup>48</sup> See Jay Yarow and Kamelia Angelova, *CHART OF THE DAY: iPad Is On Track To Be The Fastest Selling Mobile Device Ever*, BUSINESS INSIDER SAI, Jun. 22, 2010, available at <http://www.businessinsider.com/chart-of-the-day-ipad-sales-2010-6> (noting that the iPad is on track to be the fastest selling mobile device in history).

<sup>49</sup> Ferman Aziz, *iPad Hits 10,000 Apps*, PELWAVES, Jun. 12, 2010, available at <http://pelwaves.com/2010/06/12/ipad-hits-10000-apps/>; Allison Sharp, *25 iPad Apps Revolutionizing Healthcare*, THE HEALTH HAWK, May 18, 2010, available at <http://masterofpublichealth.org/2010/25-ipad-apps-revolutionizing-healthcare/>.

<sup>50</sup> See *2010 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*, Notice of Inquiry, MB Docket No. 09-182, FCC 10-92 (rel. May 25, 2010) (the "2010 Media Ownership NOP"); *FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age*, Public Notice, 25 FCC Rcd 384 (2010) ("Future of Media Public Notice").

<sup>51</sup> In *FCC v. Fox*, 129 S. Ct. 1800 (2009), the Supreme Court recently emphasized that the FCC must take technological advances into account in its adjudicatory actions. *Id.* at 1813 (noting that technological advances in bleeping technology supports stepped-up enforcement policy).

discretion, and [not] contrary to constitutional right, power, privilege, or immunity” is unwaivable and applies in the adjudicatory as well as the rulemaking context.<sup>52</sup> Its obligation to ensure its actions comport with Constitutional principles “as applied” is equally basic.<sup>53</sup> Moreover, while agencies have wide discretion as to whether they proceed by rulemaking or adjudication, even in the latter, they may modify or reverse precedent.<sup>54</sup>

As demonstrated in the waiver requests, their denial would be arbitrary and capricious given the Commission’s adoption of liberalized waiver standards in 2008, the intervening Tribune bankruptcy, continued technological growth and Congressional and FCC recognition of the same, and the fact that any of the Chicago or Hartford properties could be owned in common with numerous other media in their markets.<sup>55</sup> The Commission’s refusal to grant the waiver requests would also contravene Tribune’s Fifth Amendment rights because it would discriminate against Tribune’s constitutionally protected speech in a manner that does not restrict other speakers and furthers no substantial government interest.<sup>56</sup> Finally, a refusal to grant the waivers would violate Tribune’s First Amendment rights in several ways related to restriction of its

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<sup>52</sup> 5 USC § 706(2).

<sup>53</sup> *Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 7-8 (D.C. Cir. 2009); *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040-41 (D.C. Cir. 1997).

<sup>54</sup> *Busse Broadcasting Corp. v. FCC*, 87 F.3d 1456, 1463-64 (D.C. Cir. 1996) (dismissing similar challenge involving policy review in adjudication by noting “[g]iven the fact intensive nature of the Commission’s role in these proceedings, it is surely within the agency’s authority to proceed on a case-by-case basis rather than by rulemaking.”).

<sup>55</sup> Chicago Cross-Ownership Waiver Request at 98-102; Hartford Cross Ownership Waiver Request at 90-95.

<sup>56</sup> Chicago Cross-Ownership Waiver Request at 103; Hartford Cross-Ownership Waiver Request at 95-96.

speech, and the FCC cannot justify the restrictions under any level of scrutiny.<sup>57</sup> Petitioners' contention that all of these concerns should be excluded is plainly wrong and must be rejected.

Petitioners mistakenly contend that *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998), precludes the Commission's consideration of these issues relating to the NBCO Rule in evaluating the Exit Applications. To the contrary, in *Tribune* the D.C. Circuit merely concluded that, with respect to Tribune's facial attack on the constitutionality of the NBCO Rule based on the invalidity of the scarcity doctrine, "whether the Commission *is obliged* to reconsider its [NBCO] rule *can be raised to this court* only on review of a Commission denial or a rulemaking petition."<sup>58</sup> Thus, at most, *Tribune* stands for the narrow proposition that a *court of appeals* might not *require* the Commission to consider a *facial constitutional attack* on the NBCO Rule except on "review of a Commission denial of a rulemaking petition."<sup>59</sup> It does not, as Petitioners suggest, constitute a bar to the *FCC's* consideration of the continued constitutionality of the scarcity doctrine or any other challenges to the NBCO Rule set forth in the Exit Applications and described above.

Petitioners' contention that *Tribune* bars the FCC's consideration of its waiver policy and "as applied" constitutional challenges is meritless for the same reason. Nothing in *Tribune* suggests that the *FCC* is *barred* from considering the issues raised in the waiver requests. Moreover, the *Tribune* panel's decision declining to require the FCC to reconsider its waiver policy was based on the view that the challenges to the waiver policy in effect at that time were tantamount to a challenge "to the continuing validity of an underlying rationale justifying the

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<sup>57</sup> Chicago Cross-Ownership Waiver Request at 103-05; Hartford Cross-Ownership Waiver Request at 96-97.

<sup>58</sup> *Tribune*, 133 F.3d at 69 (emphasis added).

<sup>59</sup> *Id.* at 68.

cross-ownership rule itself.”<sup>60</sup> In this case, Tribune’s challenges to the waiver policy standard are specific to the mechanical operation of the newly instituted waiver policy. *Tribune* did not address even remotely similar provisions. Similarly, the *Tribune* panel’s decision declining to require the FCC at that time to consider Tribune’s “as applied” challenge rested on the panel’s conclusion that such a challenge was “really no different” than its facial attack.<sup>61</sup> Here, to the contrary, the extensive evidence Tribune submitted in its waiver requests establishes that Tribune’s “as applied” challenge is unique to the Chicago and Hartford markets.

Petitioners also critique what they claim are novel forms of waiver relief that Tribune has requested; relief that the Commission must consider to avoid an arbitrary, capricious and unconstitutional result. There is nothing novel about Tribune’s request for permanent NBCO relief. In Chicago, the FCC in 2007 awarded such relief to the exact same combination of properties. Growing market competition since then along with Tribune’s bankruptcy and the overall industry downturn make it arbitrary and capricious not to continue that relief. Similarly, the FCC awarded permanent relief to the Field properties in Chicago in 1977, noting the abundant diversity and competition already existing in the Chicago market at that point, and those factors have only grown more in Tribune’s favor in subsequent decades.<sup>62</sup> In addition, in affirming previous permanent waivers, the United States Court of Appeals for the District of Columbia Circuit has already noted the importance of awarding permanent waivers to resolve

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 69.

<sup>62</sup> *Field Commc’ns Corp.*, 65 F.C.C.2d 959, 960 (1977) (“*Field*”).

any uncertainty about the viability of companies trying to emerge from bankruptcy.<sup>63</sup> That concern is equally important for the Chicago and Hartford properties.

Finally, the long-term viability of the Chicago and Hartford properties also necessitates the need to preserve Tribune's ability to sell them in tandem. While no sales are currently contemplated, as Tribune emerges from bankruptcy, ensuring its company-wide flexibility to respond to market demands and challenges in a manner that maximizes value is essential to guaranteeing the "fresh start" the FCC and courts have endorsed and is necessary to comport with the Commission's obligation to provide comity to bankruptcy law.<sup>64</sup>

**III. TRIBUNE HAS DEMONSTRATED THAT ITS CHICAGO AND HARTFORD MEDIA COMBINATIONS SERVE RESIDENTS OF THEIR MARKETS AND THE PUBLIC INTEREST WELL, AND, CONTRARY TO PETITIONERS' REQUEST, THE FCC SHOULD GRANT TRIBUNE PERMANENT WAIVERS.**

**A. Tribune's Chicago and Hartford Combinations Qualify as "Failed" Properties Entitled to NBCO Waivers Based on Reversal of the FCC's 2008 Negative Presumption.**

For both Chicago and Hartford, Petitioners argue that the properties do not qualify as "failed" for purposes of reversing the negative presumption against cross-ownership because Tribune's bankruptcy was voluntary rather than involuntary. As Tribune noted in the waiver requests, such a narrow and myopic reading of the "failed" station standard would disserve the public interest and is not compelled by the administrative history of the FCC's adoption of the

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<sup>63</sup> *NAACP*, 46 F.3d at 1162.

<sup>64</sup> *Fox/WNYW*, 8 FCC Rcd at 5349 (¶¶ 41-42); *Telemundo*, 10 FCC Rcd at 1106 (¶ 12) (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) ("*WAIT Radio*"); *Dale J. Parsons, Jr.*, Memorandum Opinion and Order, 10 FCC Rcd 2718, 2720 (¶ 11) (1995); *Sam Jones, Jr.*, Memorandum Opinion and Order, 10 FCC Rcd 5330, 5341 (¶ 19) (1995). *See also LaRose*, 494 F.2d at 1147 n.2.

test or applicable law.<sup>65</sup> As a result, the Commission should find that Tribune is entitled to a presumption that continued waiver of the NBCO Rule for Tribune's Chicago and Hartford properties is in the public interest for multiple reasons.

First, an examination of the history of the "failed station" standard establishes that deeming Tribune in substantial compliance with that test is fully consistent with its underlying purpose. In 2008, the Commission decided that a negative presumption involving the NBCO Rule would be reversed for combinations involving "failed" properties.<sup>66</sup> As the Commission noted there, however, it has been applying this test in other ownership contexts for more than a quarter century.<sup>67</sup> The Commission initially formalized the "failed" property test to allow waivers of its radio/television cross-ownership rule.<sup>68</sup> Under the original standard, the Commission considered a station in bankruptcy to be "failed" regardless of whether the bankruptcy was voluntary or involuntary because the Commission concluded that broadcasters would be very unlikely to "undergo the financial hardships of filing for bankruptcy" merely to obtain a waiver of the Commission's rules.<sup>69</sup> In 1999, the Commission applied the "failed" station policy to the local television ownership or duopoly rule. In doing so, the Commission narrowed its approach, stating that only stations in involuntary bankruptcy proceedings would

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<sup>65</sup> Indeed, "substantial compliance with the substantive regulations" is sufficient. *Committee For Open Media v. FCC*, 533 F.2d 1, 6 (D.C. Cir. 1976) (approving FCC decision to waive cable television regulations based on operator's substantial compliance with grandfathering standard that excused compliance).

<sup>66</sup> *2008 Media Ownership Order*, 23 FCC Rcd at 2047-48, at ¶ 65.

<sup>67</sup> *Id.*

<sup>68</sup> *Amendment of Section 73.555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, Second Report and Order, 4 FCC Rcd 1741, 1753 (¶ 88).

<sup>69</sup> *Id.*

automatically qualify for the “failed” station presumption.<sup>70</sup> The Commission explained that the limitation would allow the Commission to avoid disputes over whether a station had entered bankruptcy merely as a means to obtain a waiver.<sup>71</sup>

In this case, Petitioners cannot claim that Tribune entered bankruptcy to obtain “failed” property waivers for its Chicago and Hartford properties. Tribune already received a permanent waiver for the Chicago combination as a result of the Commission’s action in the *2007 Tribune Order*, a little over a year before it entered bankruptcy in December 2008. In Hartford, because of the conditional relief provisions in the *2007 Tribune Order*, the newspaper/broadcast cross-ownership there was allowed to continue prior to Tribune’s bankruptcy filing. As a result, suggesting Tribune entered bankruptcy to obtain waivers is nonsensical. Tribune’s bankruptcy filing was driven by well publicized financial and business concerns; it was necessary to ensure that its properties could reorganize in order to continue providing the high-quality public services that consumers in Chicago and Hartford have come to expect. Grant of the requested waivers undeniably will help the company emerge from bankruptcy and lead to the quickest, most efficient reorganization of Tribune’s Chicago and Hartford combinations.<sup>72</sup>

Second, Petitioners erroneously argue that allowing Tribune’s voluntary bankruptcy to qualify under the “failed” property waiver standard would be contrary to the public interest because it would increase the volume of waiver requests requiring FCC review and impose on

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<sup>70</sup> *Review of the Commission’s Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12,903, 12,937-38 (¶¶ 75-76) (“*1999 Duopoly Order*”).

<sup>71</sup> *Id.* In that same order, the Commission limited the “failed” property test to involuntary bankruptcies in the radio/television ownership context as well. *Id.* at 12,954 (¶ 115).

<sup>72</sup> As the Commission recognized in adopting the “failed” station duopoly waiver test in 1999, permitting commonly owned properties to realize “the economies of scale . . . may in many circumstances be the only viable means of rejuvenating a failed station in an expeditious manner.” *1999 Duopoly Order*, 14 FCC Rcd at 12,936-37 (¶ 74).

Commission resources.<sup>73</sup> That concern is inapplicable in this case, however, because Tribune's Hartford and Chicago properties already operate pursuant to NBCO Rule waivers. Granting waiver *extensions* to bankrupt companies, allowing them to maintain the *status quo*, will not, by definition, increase the number of parties who have or seek cross-ownership waivers.

Third, Petitioners' proposed hyper-technical application of the "failed" property test could potentially result in disastrous consequences wholly at odds with the public interest, reversing or eradicating positive service like the cross-owned properties have been delivering for over 60 years in the case of Chicago and for a decade in Hartford. As explained by Dr. Mark Fratrick in his study *An Analysis of the Effect on Diversity of Separation of Local Media Combinations*, given the economic climate today in these markets, the separation of cross-owned properties is unlikely to provide the public interest benefit Petitioners predict.<sup>74</sup> Dr. Fratrick notes that the "poor financial outlook for the newspaper and local television industries requires that these properties maximize synergies and cost efficiencies in order to remain competitive and provide diverse local programming and information."<sup>75</sup> Given this need, separation of commonly owned properties would lead to the diminution, if not demise, of the superior local news and other public services that such properties typically offer, harming, rather than enhancing, the public interest.<sup>76</sup> Thus, requiring Tribune to break up its Chicago and Hartford

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<sup>73</sup> The converse result, forcing companies to be placed in involuntary bankruptcy by creditors, is equally at odds with the public interest. A timely voluntary bankruptcy is far more likely to result in the continued and uninterrupted provision of news and local programming than waiting for creditors to act.

<sup>74</sup> See Chicago Cross-Ownership Waiver Request, Attachment 9; Hartford Cross-Ownership Waiver Request, Attachment 9 ("*Fratrick Separation Analysis*").

<sup>75</sup> *Fratrick Separation Analysis* at 14

<sup>76</sup> *Id.* at 15-16.

combinations would put the already-bankrupt properties at further economic disadvantage without improving diversity in either market.

Moreover, while Petitioners seek divestiture of the Chicago and Hartford properties, they offer no evidence that such a course would even result in substitution of a different owner, as they hope. The *Fratrik Separation Analysis* also demonstrates that finding new owners for any of Tribune's cross-ownership properties would most likely be futile in today's economic environment.<sup>77</sup> The depressed state of both the broadcasting and newspaper industries makes such properties unattractive to prospective buyers.<sup>78</sup> The Commission would be further mistaken if it presumed the existence of a buyer willing to pay anything close to fair market value for properties under a divestiture order.<sup>79</sup> Even if an interested buyer could be found, the prospect of that buyer obtaining adequate financing to acquire the television or newspaper property and, if it did, of successfully operating a stand-alone facility, is extremely poor.<sup>80</sup>

The futility of Tribune's previous efforts to divest its Hartford station WTXN(TV) in more promising economic times confirms Dr. Fratrik's analysis. As the Commission recognized in the *2007 Tribune Order*, Tribune from 2000 through late 2006 attempted to sell WTXN(TV) at a fair market price but was unable to find a willing buyer.<sup>81</sup> Tribune demonstrated in its

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<sup>77</sup> *Id.* at 2-3, 16.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 3, 9-10, 13-14.

<sup>80</sup> *Id.* at 3, 16.

<sup>81</sup> *2007 Tribune Order*, 22 FCC Rcd at 21280-81(¶ 43). *See also Counterpoint Communications*, 20 FCC Rcd 8582, 8587-88 (¶¶ 12-15) (2005) ("*Counterpoint II*").

request for waiver of the duopoly restriction in Hartford that efforts to sell since then also would have been futile.<sup>82</sup>

In the past, the Commission has recognized that the futility of efforts to find an out-of-market buyer for “failed” properties justifies waiver of the NBCO Rule, and the courts have upheld that determination. For example, the United States Court of Appeals for the District of Columbia Circuit over 15 years ago affirmed the Commission’s determination that efforts to sell the *New York Post* out of bankruptcy to a buyer other than Fox were futile and that the FCC’s decision to accept cross-ownership of Fox’s New York television station and the *New York Post* without requiring a hearing was consistent with the Commission is public interest responsibility.<sup>83</sup>

The combination of Tribune’s bankruptcy and the futility of finding an out-of-market buyer willing to pay a fair market price for Tribune’s Chicago and Hartford properties qualifies each combination for reversal of any negative NBCO presumption based on the “failed” property standard. Moreover, forcing Tribune to attempt to divest any part of these combinations in all likelihood would not increase diversity or serve the public interest in any other way. The absence of any buyer willing to pay a fair market value for such property would, at best, generate long-term uncertainty. The only certain result of denying the requested waiver would be a diminution in the high level of service currently received by the public in the Chicago and

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<sup>82</sup> Hartford Duopoly Waiver Request at 6-17 (citing Declaration of Brian Byrnes, ¶¶ 4-11, April 26, 2010 (“Byrnes Decl.”); Mark Fratrick, BIA Advisory Services, LLC, *An Analysis of the Competitive and Diversity Impact of the Duopoly of WTIC-TV and WTXX(TV) in the Hartford-New Haven, CT Television Market*, Feb. 26, 2010, at 2 (“Hartford Duopoly Market Analysis”), 4-6, 7-11, 12-14; *Fratrick Separation Analysis* at 2-9.

<sup>83</sup> *NAACP*, 46 F.3d at 1162.

Hartford markets.<sup>84</sup> Given the totality of all these factors, the Commission should deem *Tribune* in substantial compliance with the “failed” station standard.<sup>85</sup>

**B. The Chicago Broadcast Properties Meet the “Substantial News” Test.**

Petitioners disagree with Tribune’s showing that its Chicago cross-ownership combination is entitled to a reversal of any negative presumption against NBCO relief because its stations there satisfy the “substantial news” test.<sup>86</sup> (Petitioners raise this objection only with respect to the Chicago combination.) Under that test, the Commission has indicated that it will apply a positive presumption to any combination that includes a broadcast station that “was not offering local newscasts prior to the combination,” and that “will initiate at least seven hours per week of local news programming after the combination.”<sup>87</sup>

Petitioners essentially concede that Tribune’s Chicago properties have made substantial increases in news in the last several years. When Tribune sought waiver of the NBCO Rule in 2007, WGN-TV broadcast 31.5 hours per week of local news.<sup>88</sup> Today, WGN-TV broadcasts 42 hours per week, an increase of more than 10 hours.<sup>89</sup> WGN(AM) has continued to operate a

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<sup>84</sup> While the heading of Section V.1. of Petitioners’ filing implies that the requested waiver also should be denied because Tribune’s Chicago combination does not satisfy the “failing” station waiver test, Tribune did not seek a waiver based on that standard. Section VI.C.1. of Petitioners’ filing discusses reversing any negative presumption against NBCO relief in Hartford based only on the “failed” station standard.

<sup>85</sup> As noted above, “substantial compliance with the substantive regulations” is sufficient. *Committee For Open Media*, 533 F.2d at 6.

<sup>86</sup> Petition at 30-31.

<sup>87</sup> 47 C.F.R. § 73.3555(d)(7)(ii); *2008 Media Ownership Order*, 23 FCC Rcd at 2049 (¶ 67).

<sup>88</sup> See Application for Consent To Transfer Control of Entity Holding Broadcast Station Construction Permit or License, FCC File No. BTCCT-20070501AGE, Exhibit 18 at 21 (WGN-TV aired 31.5 hours).

<sup>89</sup> Chicago Cross-Ownership Waiver Request at 40 & Attachment 1.

24-hour a day news/talk format, featuring almost exclusively locally-produced news and other public affairs content.<sup>90</sup> These are precisely the kind of efforts that the substantial news test was designed to encourage and reward.

Faced with the indisputable fact of high levels of news, including recent increases, Petitioners make two unpersuasive arguments in an effort to deprive Tribune of the benefit of the Commission's test. First, Petitioners argue that only *new* cross-ownership combinations can satisfy this test and that Tribune's Chicago broadcast stations do not qualify because they have already been local news leaders there for more than 60 years.<sup>91</sup> To limit reversal of the negative presumption in this manner would punitively deprive combined properties that have acted responsibly in increasing news of the benefit of their hard work; it would also perversely eliminate any incentive for other properties that may in the future seek deals requiring cross-ownership waivers to continue to provide or increase their news in the interim. Finally it would discourage any improvement by marginal stand-alone stations that may not offer news but may have plans to seek to become cross-owned. Such results also run counter to the FCC's interest in increasing localism and diversity. Nothing in the rule suggests that the FCC intended these bizarre results that would be caused by limiting the test to only new combinations, as Petitioners suggest.

Second, Petitioners argue that Tribune's Chicago combination should be deprived of the positive presumption generated by the substantial news test because Tribune allegedly is "threatening" to reduce the amount of local news it produces.<sup>92</sup> That is simply untrue. Tribune

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<sup>90</sup> *Id.* at 41.

<sup>91</sup> Petition at 30-31.

<sup>92</sup> *Id.* at 31.

has merely pointed out that the great quantity of local news that it airs has been made possible, in part, by the efficiencies and synergies of cross-ownership. That WGN-TV and WGN(AM) would likely be unable to maintain their current level of news if they were forced to operate separately is not a “threat”; it is an economic fact of life with significant support in the record.<sup>93</sup> The Commission has recognized the importance of applying the NBCO Rule, particularly to distressed stations, in a manner that preserves the local news services provided by the properties,<sup>94</sup> and the Commission should apply the “substantial news” test in a manner that serves that same policy. In this case, that course requires extending the existing cross-ownership waiver to ensure that the local services provided by WGN-TV and WGN(AM) continue undiminished.

**C. As the Waiver Request Shows, Tribune’s Chicago Properties Meet the Four-Factor Test For Rebutting the Negative Presumption.**

Petitioners concede that, even if Tribune is not entitled to a positive presumption based on the tests above, it still can qualify for a waiver by rebutting any negative presumption if it shows that permitting the combination (1) significantly increases the amount of news available in the market; (2) maintains the editorial independence of the cross-owned properties; (3) does not lead to undue market concentration; and (4) is available because the properties are suffering financial distress.<sup>95</sup> As the waiver request shows, Tribune has satisfied each of these factors, and

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<sup>93</sup> See, e.g., Chicago Cross-Ownership Waiver Request at 56-58; Hartford Cross-Ownership Waiver Request at 48-50; *Fratrik Separation Analysis* at 15-16.

<sup>94</sup> *K. Rupert Murdoch and Fox Entertainment Group*, 24 FCC Rcd 5824, 5825-26 (¶ 6) (2009) (citing *Fox/WNYW*, *supra* n.24; *UTV of San Francisco*, 16 FCC Rcd 14,975 (2001)); *Fox Television Stations*, 21 FCC Rcd 11,499, 11,501-02 (2006).

<sup>95</sup> Petitions at 32-35, 45-49 (citing 47 C.F.R. § 73.35555(d)(5)). Only if the Commission determines that the Chicago combination is not entitled to reversal of a negative presumption because it lacks status as “failed” or as a provider of “substantial news” does the FCC need to consider this demonstration of how it satisfies the “four-factor” test.

Petitioners fail to provide any basis to challenge this conclusion and the permanent waiver in Chicago that Tribune seeks.

**1. Increased News.**

Reminiscent of their argument regarding the “substantial news” test, Petitioners implausibly argue that this first factor is not satisfied in Chicago because Tribune has failed to promise to “significantly increase” the amount of news distributed in the market. Petitioners again ignore Tribune’s showing that it already provides more television news (42 hours per week) than any other station in the market and that it has added 10 hours per week of local news over the past two years. Moreover, they also fail to acknowledge that WGN(AM) already offers local news and talk programming 24 hours per day, 7 days a week.

The Commission should reject Petitioners’ nonsensical reading of this standard. In its decision adding the new waiver tests to the NBCO Rule, the Commission indicated that it is “critical that our rules do not unduly stifle efficient combinations that are *likely to preserve* or increase the amount and quality of local news available to consumers via newspaper and broadcast outlets.”<sup>96</sup> Indeed, in adopting this factor, the Commission pointed favorably to the historical results in increasing local news achieved by co-owned properties of, among others, Belo and Media General.<sup>97</sup> Thus, in assessing whether this factor is met, the Commission obviously intended to examine, in the case of an existing combination, whether that combination has in the past significantly increased the amount of local news available in the market. That reading would be consistent with the *2008 Media Ownership Order*, which considered this factor related to the policy goal of “establishing and maintaining a system of local broadcasting that is

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<sup>96</sup> *2008 Media Ownership Order*, 23 FCC Rcd at 2030 (¶ 35) (emphasis added).

<sup>97</sup> *Id.* at 2050 (¶ 69).

responsive to the unique interests and needs of individual communities.”<sup>98</sup> That is precisely what Tribune has done through its Chicago combination. For decades, it has offered local broadcasts responsive to the unique interests and needs of individual communities, with a special emphasis on being the market leader for local news.

In the instant case, the factor and the policy goals it furthers are easily satisfied due to the clear and convincing evidence in the waiver request demonstrating that Tribune’s broadcast properties provide an exceptional level of news programming. Tribune’s waiver request is replete with examples of the extensive local news and public service provided as a result of cross-ownership:

- WGN-TV airs more news than any other station in the market, and its newscasts often outrank those of the Big-4 networks.<sup>99</sup>
- WGN(AM) broadcasts an all-local news/talk format, a true rarity in radio today, providing news updates twice every hour and extended news programming during morning and afternoon drive time.<sup>100</sup>

For breaking news, the multiple resources of *Chicago Tribune*, WGN-TV, and WGN(AM) have ensured timely and multi-faceted coverage of many of the city’s critical news events and developments. As example after example in the waiver requests shows, each of Tribune’s Chicago properties is able to draw on the resources of the others, allowing them to provide coverage of local news stories that is more immediate, detailed, and in-depth than would otherwise be possible.<sup>101</sup> The properties provide public service of the first order, and Petitioners offer no suggestion of what would replace such service if the Chicago waiver were not approved.

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<sup>98</sup> *Id.* at 2050-51 (¶ 70).

<sup>99</sup> Chicago Cross-Ownership Waiver Request at 4, 40-41.

<sup>100</sup> *Id.* at 4, 41-42.

<sup>101</sup> *Id.* at 42-55.

Indeed, Tribune's waiver request shows that for many decades Tribune's corporate identity in Chicago and the reputation of each of the cross-owned properties has been built on being the leading provider of local news. Because Tribune has shown that cross-ownership significantly increases the amount of news available to the Chicago market and that these properties likely would not maintain their current level of news service absent cross-ownership, the Commission should find Tribune has satisfied the first factor rebutting any negative presumption.

## 2. Independent News Judgment.

Tribune also has demonstrated that it maintains editorial and staff independence among its cross-owned properties in Chicago, satisfying this second factor. In the *2008 Media Ownership Order*, the Commission explained the matters it would examine in reviewing whether properties seeking an NBCO Rule waiver exercise independent news judgment.<sup>102</sup> The *2008 Media Ownership Order* notes the need for separate news and editorial staffs and separation among "any personnel who control editorials and commentary, such as editorial boards."<sup>103</sup> At the same time, the Commission noted that:

[T]his factor should not preclude the economic and operational synergies that we aim to encourage by allowing certain combinations. Accordingly, maintaining editorial independence does not mean that a combination will be unable to take advantage of the potential opportunity for additional newsgathering that common ownership provides or require that the outlets abstain from sharing some newsgathering inputs.<sup>104</sup>

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<sup>102</sup> *2008 Media Ownership Order*, 23 FCC Rcd at 2051 (¶ 71).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

Tribune's waiver request clearly meets the requirements for this factor, as set forth by the FCC. At the same time, its common ownership advances the synergies that the FCC notes should be preserved.

As described in the waiver request, *Chicago Tribune* maintains an independent editorial board; WGN-TV and WGN(AM) have no role in the decisions of that board.<sup>105</sup> Tribune's Chicago properties share resources to enhance gathering facts for their news product, but they employ separate reportorial and editorial staffs that independently write, edit, and decide what content to disseminate over each property. Indeed, the waiver request cited several examples of when the properties have criticized each other's news coverage and editorial positions.<sup>106</sup> Such criticism demonstrates that, while combining resources leads to increased quality and quantity of news coverage, it does not compromise the properties' editorial independence.

Petitioners attempt to conflate geographical proximity with the absence of independent news judgment. Thus, they note that WGN(AM) "has its studio in the Tribune building"; that WGN-TV also "maintain[s] a television studio in *Chicago Tribune's* newsroom"; and so on.<sup>107</sup> Under this simplistic theory, Democrats and Republicans who both have offices in the same Senate or House Office Building do not exercise any independent judgment and agree on everything. Petitioners' speculation, based on the proximity of offices, is nothing but speculation.

Petitioners also confuse the instances of cooperation cited in Tribune's waiver request with a lack of editorial independence. The *2008 Media Ownership Order* clearly demonstrates

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<sup>105</sup> Chicago Cross-Ownership Waiver Request at 51-52.

<sup>106</sup> *Id.* at 47-48, 116.

<sup>107</sup> Petition at 33.

that the Commission recognizes the value produced by collaboration among commonly owned news operations, so long as editorial independence is maintained.<sup>108</sup> Petitioners claim that the discussions held between the properties' assignment editors compromise their editorial independence, but they do not cite a single example of when that has changed the editorial perspective of a story. Likewise, Petitioners complain that the Chicago properties share video that may have been shot in the field but offer no instance in which any particular property failed to make its own independent decisions in editing that video and deciding how and when to air or disseminate it.

While Tribune provides concrete evidence of editorial independence and specific examples of times when the editorial positions of the various properties have led them to criticize each other in print and on-the-air, Petitioners offer only speculation that cooperation *must* destroy the editorial independence of Tribune's Chicago properties. There is no reasonable basis for choosing Petitioners' speculation over Tribune's evidence. The demonstrated editorial and news independence of Tribune's Chicago properties more than satisfies this second factor for reversing any negative presumption that might apply to Tribune's Chicago cross-ownership.

### **3. Lack of Concentration.**

Tribune also has demonstrated that the media market in Chicago is far from concentrated, the third factor the Commission evaluates in coordinating whether a negative presumption has been rebutted. In suggesting market concentration as a factor worthy of inquiry, the *2008 Media Ownership Order* stressed that the Commission would conduct a fact-intensive review that examines both diversity and competition in local media markets.<sup>109</sup> In evaluating the factor, the

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<sup>108</sup> *2008 Media Ownership Order*, 23 FCC Rcd at 2051 (¶ 71).

<sup>109</sup> *Id.* at 2051-53 (¶¶ 72-73).

FCC explained that it will not employ “any single metric” in analyzing “the number of independent voices that would remain in the market after the combination and would also review the relative power and influence of these voices and the outlets that the applicant proposes to own.”<sup>110</sup> Among the possible metrics the Commission’s discussion suggests is the Herfindahl-Hirschman Index (“HHI”) as utilized by the Department of Justice’s Merger Guidelines.<sup>111</sup> Tribune’s showing demonstrated that the Chicago market is remarkably vibrant and diverse by any measure.

Chicago is the nation’s third largest media market, and no one can dispute that numerous competing media voices serve the Chicago community. Indeed, Petitioners themselves recount that Chicago has:

- 16 full-power television stations owned by 13 companies;
- 16 low-power and Class A television stations owned by 11 companies;
- 166 full-power radio stations owned by 90 companies;
- 24 daily newspapers owned by 12 companies;
- 172 weekly newspapers owned by 50 companies;
- 65 specialty and 14 collegiate publications; and
- 49 local magazines.<sup>112</sup>

To demonstrate the lack of market concentration in Chicago, the waiver request itself provides scores of pages chronicling all the traditional outlets in the DMA and, in many cases, their

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<sup>110</sup> *Id.* at 2052-53 (¶ 73).

<sup>111</sup> *Id.*

<sup>112</sup> Petition at 34.

owners.<sup>113</sup> Tribune's waiver request also describes the growing list of non-traditional media, including Internet sites and cable and satellite providers, that play an increasingly significant role in the Chicago market.<sup>114</sup> On at least two previous occasions, the Commission has found concentration levels in Chicago of no concern in granting permanent waivers for the NBCO Rule.<sup>115</sup> The market is many times more competitive than in 1977 and more competitive than in 2007 when the Commission made these determinations.<sup>116</sup>

In addition, the waiver request provides an expert analysis that employs an HHI, consistent with Department of Justice and Federal Trade Commission practices, measuring the level of concentration in the market.<sup>117</sup> This study shows that the Chicago market, with an HHI of 1,230, is significantly less concentrated than the average market nationwide, which has an HHI of 1,339.<sup>118</sup> The study also shows that the HHI has been steadily declining over the last several years and is almost 30 points lower than 2007 when the FCC issued this same combination a permanent NBCO waiver. Under the Department of Justice's Merger Guidelines, an HHI of 1230 means the market is "moderately concentrated." Moreover, under the *Merger*

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<sup>113</sup> *Chicago Market Analysis*, Appendices A-F; Chicago Cross-Ownership Waiver Request, Attachment 5, 6.

<sup>114</sup> Chicago Cross-Ownership Waiver Request at 64-67, 82-84, 86-87, and Attachments 5-8.

<sup>115</sup> *2007 Tribune Order*, 22 FCC Rcd at 21,277-78 (¶ 34); *Field*, 65 F.C.C.2d at 960.

<sup>116</sup> See Chicago Cross-Ownership Waiver Request, Attachment 4, Mark R. Fratrick, *Report on the Chicago, IL Media Market: Media Diversity, Revenue Share, and Concentration Analysis in Support of Request for Cross-Ownership Waiver for Stations WGN-TV and WGN(AM)*, Feb. 26, 2010, at 13 ("*Chicago Market Analysis*") (showing downward trend in concentration levels and declining market concentration since 2007).

<sup>117</sup> *Chicago Market Analysis* at 10-14. See also Dept. of Justice & FTC, *Horizontal merger Guidelines*, Section 1.51 (rev. Apr. 1997), available at [http://www.justice.gov/atr/public/guidelines/horiz\\_book/15.html](http://www.justice.gov/atr/public/guidelines/horiz_book/15.html) (the "*Merger Guidelines*").

<sup>118</sup> *Chicago Market Analysis* at 11.

*Guidelines*, transactions that increase an HHI in this range by less than 100 points are “unlikely, to have adverse competitive consequences and ordinarily require[s] no further analysis.”<sup>119</sup> That standard is clearly met here because allowing a continued waiver as part of Tribune’s reorganization will not increase the HHI at all in Chicago; it will merely maintain the *status quo*.

Petitioners argue that the HHI figure for Chicago is artificially suppressed because it includes non-commercial media that do not sell advertising, but this is incorrect.<sup>120</sup> Dr. Fratrick’s study makes clear that his HHI calculation includes only commercial media.<sup>121</sup> Moreover, he explains that his HHI calculations actually are likely somewhat *inflated* because they are limited to only three traditional media sources (newspapers, television, and radio), excluding fast-growing non-traditional media, such as cable, satellite, and the Internet, which are taking an increasingly large share of advertising revenues from traditional media, like Tribune’s properties in the Chicago market.<sup>122</sup>

Tribune’s documentation of the widespread availability of diverse media in Chicago and Dr. Fratrick’s market analysis together provide clear and convincing evidence that Tribune’s cross-ownership has not led to a level of concentration warranting Commission concern. Thus,

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<sup>119</sup> *Merger Guidelines*, Section 1.51.

<sup>120</sup> Petition at 34-35. To the extent Petitioners are arguing that non-commercial stations should not be included in an analysis of the *diversity* of the Chicago market, they are simply wrong. While noncommercial media were properly excluded from Tribune’s economic analysis of the market, Commission precedent supports including noncommercial media in a diversity review.

<sup>121</sup> *Chicago Market Analysis* at 10.

<sup>122</sup> *Id.* Rather than retain their own expert, Petitioners instead complain that they do not have some of the underlying data used in Dr. Fratrick’s analysis. Petition at 34. Petitioners could have retained their own expert and submitted their own analysis. Having failed to do so, they have presented no evidence sufficient to rebut the evidence Tribune submitted. Moreover, the underlying data are available to Petitioners, but they did not seek to obtain them, instead choosing simply to complain about their absence.

the third factor for rebutting the negative presumption clearly compels granting the requested waiver.

**4. Financial Distress.**

Tribune's bankruptcy establishes unequivocally that its Chicago properties are suffering from financial distress in a manner sufficient to satisfy the fourth factor of the Commission's analysis. As noted in the waiver request, the bankruptcy court filing shows that Tribune's subsidiaries, including those owning the Chicago properties, are jointly and severally liable for approximately \$10.2 billion of Tribune's indebtedness as guarantors under various credit agreements. That liability, if presently allocated among the guarantors, would consume all of the value of the subsidiaries.<sup>123</sup>

Petitioners' contention that Tribune has provided an inadequate amount of financial information to justify a finding of financial distress is belied by the fact that its bankruptcy is a matter of public record, and extensive materials on file in the bankruptcy proceeding document the financial distress. The bankruptcy, which has now lasted nearly two years, is a major hardship; it is a large undertaking involving court supervision, above-market credit terms, legions of professionals, and multiple experts, all working to sort out the company's finances and ensure that the properties' have a stable economic foundation on which to emerge from bankruptcy.

Petitioners also claim that Tribune has not offered sufficient guarantees that it will make significant investments in newsroom operations in the future.<sup>124</sup> This argument is entirely speculative. Petitioners simply offer only the baseless comment that the Commission should be

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<sup>123</sup> Chicago Cross-Ownership Waiver Request at 111.

<sup>124</sup> Petition at 35.

concerned that “the new owners will demand further cost-cutting.”<sup>125</sup> They provide no evidence of contemplated changes in the properties’ news service. To the extent Tribune management is contemplating any changes in the market related to news, those changes, if any, would enhance the news operation.

**D. As Its Waiver Request Shows, Tribune Is Entitled to Both NBCO and Duopoly Relief in Hartford.**

The record also overwhelmingly supports Tribune’s request for NBCO and duopoly waivers for its Hartford properties. During the period of common ownership, Tribune has substantially increased the amount and quality of local news provided to the market. Tribune has consistently made these efforts to improve public service over the last decade, despite two recessions, its own intervening bankruptcy, the historic downward spiral of the newspaper industry, and the extreme financial challenges facing broadcasters.

In an effort to distract the Commission from the salient facts, Petitioners argue that Tribune has been “gaming” the system because it has had to extend its legitimately obtained waivers on several occasions.<sup>126</sup> This contention is unsupportable. Petitioners’ account ignores that the FCC’s review and efforts to revise its multiple ownership rules over the last decade have followed a tortuous administrative and judicial path and that, at various times during this period, relevant FCC decisions have recognized the anomalous history of the Tribune Hartford proceedings and the public interest rationales for retaining the combination. These decisions refute Petitioners’ “gaming” allegations. For instance, with respect to the NBCO Rule, the Commission in 2005 noted the “difficult and unique circumstances” presented by the *Courant-WTXX(TV)* combination but found that “the public interest [was] better served” by providing it

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 36-42.

the with a waiver coterminous with WTXS(TV)'s renewal cycle. Such a step, the FCC said "provide[d] the best hope that WTXS(TV) will remain on the air and as a source of news, information, and entertainment for citizens in the Hartford DMA."<sup>127</sup> On the duopoly rule, Petitioners similarly ignore that twice the FCC has found that granting a permanent "failing station" waiver for the WTXS(TV)-WTIC-TV combination has been warranted, particularly in light of their improved news coverage of the market.<sup>128</sup> As described in the waiver requests and below, continued NBCO and duopoly relief is warranted to preserve the high quality local news and information Tribune's properties provide to the residents of the Hartford DMA.<sup>129</sup>

**1. The Hartford Properties Meet the Four-Factor Test.**

As with Chicago, Tribune's Hartford waiver request clearly and convincingly demonstrates that common ownership of WTIC-TV, WTXS(TV), and the *Hartford Courant* ensures provision of extensive local news content without harming diversity or competition in the vibrantly competitive Hartford DMA. As described below, Tribune's showing regarding the four factors rebuts any negative presumption and is more than sufficient to support the permanent waiver Tribune seeks.

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<sup>127</sup> *Counterpoint II*, 20 FCC Rcd at 8584 (footnote omitted).

<sup>128</sup> *2007 Tribune Order*, 22 FCC Rcd 21,281 (¶ 44-45); *Counterpoint I*, 16 FCC Rcd at 15,045-47.

<sup>129</sup> As described earlier in Section III.A., Tribune's Hartford combination should be presumed to be in the public interest because Tribune's bankruptcy qualifies the Hartford properties as "failed" under the standard for reversing any negative presumption applicable as a result of the *2008 Media Ownership Order*. Only in the event the Commission decides that reversal of the negative presumption is not first warranted because the Hartford properties somehow fail to qualify for "failed" status, does it need to consider the following demonstration of how the combination satisfies the "four-factor" test for rebutting the presumption.

**a. Increased News.**

As the record demonstrates and Petitioners do not contest, WTIC-TV leads the Hartford market in airing 35.5 hours of local news each week, a level that represents a 10-fold increase over the amount of news aired on the station when Tribune acquired it in 1997. WTIC-TV's nightly 10 p.m. newscast is simulcast on WTXS(TV), a station that was not producing and broadcasting local news when Tribune acquired it in 2001. As also documented in the Hartford waiver request, in addition to WTIC-TV's extensive investigative and political reports, its newscasts frequently provide coverage of events and developments specific to Waterbury, WTXS(TV)'s community of license, and its environs. In addition, Tribune has added locally originated programming to WTXS(TV)'s schedule, including a daily half-hour broadcast of a Catholic mass, which expands to an hour on weekends; weekly broadcast of the public affairs program *The Real Story*; and local origination specials like a 30-minute program covering the "welcome home" parade for the University of Connecticut's women's basketball team earlier this year and a celebrity basketball game in Waterbury held to benefit a local charity. But for common ownership, Tribune is confident that WTXS(TV) likely would not air regular news broadcasts or such locally oriented news and public service programming on a long-term basis.

Unable to counter this evidence directly, Petitioners make two unpersuasive arguments. First, they contend that Tribune's ownership of WTIC-TV for several years before it purchased WTXS(TV) and the *Hartford Courant* somehow suggests that common ownership is not necessary for WTIC-TV's continued provision of news.<sup>130</sup> This argument ignores the fact that

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<sup>130</sup> Petition at 46. Petitioners also suggest, as they did in connection with the Chicago market, that Tribune must promise to increase the amount of local news in the future to satisfy the increased local news criteria. This argument fails for the reasons previously discussed. *See supra*, 31-33. Among other things, in adopting the liberalized waiver criteria in 2008, the Commission found that it is "critical that our rules do not unduly stifle efficient combinations that are likely to *preserve* or increase the amount and quality of local news available to

not only has the quantity of WTIC-TV's local news, but also its quality, dramatically increased since 2000, when Tribune acquired the *Courant*. At that time, WTIC-TV aired only 6.5 hours of local news per week.<sup>131</sup> Today that figure is 35.5 hours, the highest total for any station in the market.<sup>132</sup>

Second, Petitioners suggest that recent staff cuts at the *Hartford Courant* evidence a lack of commitment to local news on Tribune's part, implying that Tribune's specific public benefits are unlikely to continue. Nothing could be further from the truth. The Commission has already recognized the severe downturn in the newspaper industry, the financial challenges facing broadcasters, and the staff cuts that are occurring throughout the media industry.<sup>133</sup> Tribune's waiver request updates the troubling financial picture that the Commission recounted in the *2008 Order*. Reductions in staff at the *Hartford Courant* simply reflect the reality that, across the board, newspaper revenues no longer support the level of staffing they once did.

Nonetheless, despite the lay-offs, which have been common throughout the entire industry, Tribune's Hartford broadcast properties have not curtailed the news programming they provide. This is because their news product is market-driven and responsive to customer needs.

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consumers via newspaper and broadcast outlets." *2008 Media Ownership Order*, 23 FCC Rcd at 2030 (¶ 35). Thus, in assessing whether this standard is met, the Commission obviously intended to examine, in the case of an existing combination, whether that combination has in the past significantly increased the amount of news available in the market.

<sup>131</sup> Application for Consent To Transfer Control of Entity Holding Broadcast Station Construction Permit or License, Tribune Television Company, BTCCT-20070501AFC, Exhibit 18 at 20.

<sup>132</sup> Hartford Cross-Ownership Waiver Request at 37 & Attachment 1. The quality of WTIC-TV's local news product is evidenced by the long list of journalistic awards it has received in recent years. *See id.* at Exhibit 2-B.

<sup>133</sup> *2008 Media Ownership Order*, 23 FCC Rcd at 2026-2030 (¶¶ 27-35); *2010 Media Ownership NOI* at ¶¶ 5-6, 9; *Future of Media Public Notice*, 25 FCC Rcd at 384-85.

On a daily basis, Tribune's Hartford properties, like those in all its markets, react and respond to consumers' choices and preferences about how they get their news, information, and entertainment as well as advertisers' choices and preferences about how they desire to spend their advertising dollars. Responses Tribune may make to consumer and client preferences do not reflect any reduction in its commitment to journalism and public service. Indeed, they are consistently designed to enable the company to compete more effectively in the digital media environment.

Finally, the economic and business realities that underlie any cuts or downsizings reveal the lack of market power held by newspapers and independent broadcast stations. The market dominance Petitioners try to ascribe to these properties is not reflected in the declining ratings, circulation, and revenues plaguing all traditional media companies, including Tribune. Contrary to Petitioners' contention, these realities reflect that Tribune's viewers and readers all have numerous other very competitive sources to which they can turn for news and entertainment.

**b. Independent News Judgment.**

As noted above for Chicago, the FCC explained in the *2008 Order* that, in reviewing whether properties seeking an NBCO Rule waiver exercise independent news judgment, it would expect evidence of separate news and editorial staffs and separation among "any personnel who control editorials and commentary, such as editorial boards."<sup>134</sup> At the same time, the Commission noted that this factor was not meant to "preclude the economic and operational savings that we aim to encourage by allowing certain combinations."<sup>135</sup> Moreover, "maintaining editorial independence does not mean that a combination will be unable to take advantage of the

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<sup>134</sup> *2008 Media Ownership Order*, 23 FCC Rcd at 2051 (¶ 71).

<sup>135</sup> *Id.*

potential opportunity for additional newsgathering that common ownership provides or require that the outlets abstain from sharing some newsgathering inputs.”<sup>136</sup> Tribune’s Hartford waiver request clearly meets this factor, as described by the FCC. At the same time, its common ownership advances the synergies that the FCC notes should be preserved.

As set forth in the waiver request, the *Courant* maintains an independent editorial board; WTIC-TV and WTXN(TV) have no role in the decisions of this board.<sup>137</sup> The newspaper and the television stations have their own separate reporters and editors; twice a day, the staffs of each hold their own, separate assignment meetings.<sup>138</sup> Afterwards, lists of stories are exchanged and one designated employee tracks the flow of resources, but, as noted, these steps do not override the independent editorial decisions of the news properties. Instead, these checks are needed in a financially challenging environment to ensure “deployment of adequate and non-duplicative resources to cover the most important local news stories unfolding that day.”<sup>139</sup> Such coordination is exactly what the FCC had in mind in noting “the economic and operational synergies . . . it aim[ed] to encourage.”<sup>140</sup>

Petitioners do not provide any evidence at all suggesting that the stations and the newspaper exhibit a lack of editorial independence. Indeed, as they did with respect to the Chicago combination, Petitioners simply speculate that geographical proximity (the Hartford properties are located in a single building) equates to lack of independent news judgment. Such

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<sup>136</sup> *Id.*

<sup>137</sup> Hartford Cross-Ownership Waiver Request at 44.

<sup>138</sup> *Id.* at 36-37.

<sup>139</sup> *Id.* at 37.

<sup>140</sup> 2008 Media Ownership Order, 23 FCC Rcd at 2051 (¶ 71).

speculation is an insufficient basis for challenging continuation of the Hartford combination as contrary to the public interest. Instead, the Commission should recognize the editorial independence of the Hartford properties and find that this factor supports grant of the requested waiver.

**c. Lack of Concentration.**

Hartford is the nation's 30th largest DMA, and the waiver request utilizes two principal approaches to show that the market is served by a large number of diverse and competitive voices. First, the waiver request provides extensive lists of the following outlets available in the market, along with, in most cases, identification of their owners: full-power television stations; their multicast streams; Class A and LPTV stations; daily newspapers; weekly newspapers; specialty newspapers; "shoppers"; college newspapers; local magazines; full-power radio stations; their multicast streams; satellite video channels and local signals they deliver; satellite radio channels; and local cable programming.<sup>141</sup> Although WTIC-TV is the market leader in news, five other television stations in the market also provide news, and together they air over 140 hours of local news programming per week; more than a dozen radio stations offer a news and information format. In addition, the waiver request provides a list of local cable programming and independent Internet news sites in the market and data on use of the sites over the last year.<sup>142</sup> In all, this material shows that Hartford is served by numerous traditional media as well as by a growing list of non-traditional media, which play an increasingly large role in

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<sup>141</sup> Hartford Cross-Ownership Waiver Request, Attachment 4, Mark Fratrick, *Report on the Hartford-New Haven, CT Media Market: Media Diversity, Revenue Share, and Concentration Analysis in Support of the Request for Cross-Ownership Waiver for Television Stations WTIC-TV and WTXX(TV)*, Feb. 26, 2010, at Appendices A-F ("*Hartford Cross-Ownership Market Analysis*"); Attachments 5-7.

<sup>142</sup> Hartford Cross-Ownership Waiver Request, Attachments 6 & 8.

meeting consumers' and advertisers' needs.<sup>143</sup> The diverse and competitive make-up of the Hartford DMA typifies the growth of sources in markets nationwide that has led the Commission over the past two decades to liberalize and, in many instances, repeal its media ownership rules.<sup>144</sup>

To demonstrate further the lack of market concentration in Hartford, the waiver request provides an expert estimate of the HHI, measuring the level of concentration in the market consistent with Department of Justice and Federal Trade Commission practices.<sup>145</sup> This study, which very conservatively defines the market as including only commercial radio and television stations and daily newspapers, shows that the Hartford market does not exhibit a level of concentration causing concern. This conservative calculation yields an HHI of 1,256 – a full 50 points below the average for markets ranked 26 through 35 and nearly 100 points below the national average of 1,339 for all markets.<sup>146</sup> This level is considered “moderately concentrated” by the Department of Justice and the Federal Trade Commission and falls in the range in which those agencies permit further consolidation. As noted above for Chicago, under the Justice Department’s *Merger Guidelines*, transactions that increase a “moderately concentrated” HHI by no more than 100 are unlikely to have adverse competitive consequences and ordinarily require no further analysis.<sup>147</sup> In this instance, continuation of the *status quo* in Hartford will not affect the HHI. Moreover, calculation of the actual HHI – one based on all the outlets with which

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<sup>143</sup> *Id.* at 50-63, 66, 75-76.

<sup>144</sup> *See, e.g., 2008 Media Ownership Order*, 23 FCC Rcd 2031-32 (¶¶ 37-38); *1999 Duopoly Order*, 14 FCC Rcd at 12947 (¶ 100).

<sup>145</sup> *Hartford Cross-Ownership Market Analysis* at 11-12.

<sup>146</sup> *Id.* at 12-13.

<sup>147</sup> *See supra* pages 37-38.

Tribune truly competes in the market, many of which are listed in the lengthy charts in the waiver request – would yield a value below 1,000, the level at which “moderated concentration” is deemed to begin.

Petitioners argue that Tribune exaggerates the level of competition by improperly including in its analysis properties outside the city of Hartford with which they claim Tribune does not compete.<sup>148</sup> Petitioners offer no legal or quantitative support for this argument, simply a trade press article on the fact that Nielsen provides three sets of ratings for different parts of the market, which is the largest of Nielsen’s three “dual market” DMAs.<sup>149</sup> Dr. Fratrik’s study was properly conducted on a DMA-wide basis, covering the area relevant to advertisers and the area in which Tribune’s properties certainly find themselves competing for advertisers, although frequently that competition even extends to outlets beyond the DMA’s borders. Moreover, as noted, the HHI calculation is actually somewhat *inflated* because it is limited to only three traditional media and excludes fast-growing non-traditional media.<sup>150</sup>

The waiver request’s extensive lists of innumerable media outlets in the DMA and Dr. Fratrik’s market analysis together provide clear and convincing evidence that Tribune’s cross-ownership has not led – not will its continuation lead – to a level of concentration in any way

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<sup>148</sup> Petition at 47-48.

<sup>149</sup> *Id.* (citing Katy Bachman, *Market Profile: Hartford and New Haven, Conn.*, Media Week, May 23, 2010, [http://www.mediaweek.com/mw/content\\_display/eseach/e3idbde8a913c88374258be39dce6713ff1](http://www.mediaweek.com/mw/content_display/eseach/e3idbde8a913c88374258be39dce6713ff1)).

<sup>150</sup> *Hartford Cross-Ownership Market Analysis* at 15. Rather than retain their own expert, Petitioners instead complain that they do not have some of the underlying data used in Dr. Fratrik’s analysis. Petition at 47-48. Petitioners could have retained their own expert and submitted their own analysis. Having failed to do so, they have presented no evidence sufficient to rebut the evidence Tribune submitted. Moreover, the underlying data are available to Petitioners, but they did not seek to obtain them, instead choosing simply to complain about their absence.

warranting Commission concern. As a result, the third factor for rebutting the negative presumption is decidedly in favor of granting the requested waiver.

**d. Financial Distress.**

As described above regarding Chicago, Tribune's bankruptcy in itself is clear and convincing evidence that its Hartford properties are suffering financial distress sufficient to satisfy the fourth factor of the Commission's analysis. Petitioners' contention that Tribune has provided an inadequate amount of financial information to justify a finding of financial distress with respect to the Hartford properties is belied by the fact that its bankruptcy is a matter of public record and extensive materials on file in the bankruptcy proceeding clearly document the financial distress of those properties. The bankruptcy, which has now lasted nearly two years, is a major hardship; it is a large undertaking including court supervision, above-market credit terms, legions of professionals, and multiple experts, all working to sort out the company's finances and ensure that the properties' have a stable economic foundation on which to emerge from bankruptcy.

Petitioners also claim that Tribune has not offered sufficient guarantees that it will make significant investments in newsroom operations in the future. As described above, however, this argument is entirely speculative. Petitioners offer the purely baseless contention that the proposed transferees have "a reputation for cutting costs and making a quick sale."<sup>151</sup> They provide no evidence of contemplated changes in the properties' news service. As noted above, to the extent Tribune management is contemplating any changes in the market related to news, those changes, if any, would enhance the news operation.

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<sup>151</sup> Petition at 49.

**2. Tribune's Request for Waiver of the Duopoly Rule for WTIC-TV and WTXX(TV) Should Be Granted.**

Permanent waiver of the duopoly rule to permit Tribune to retain ownership of WTIC-TV and WTXX(TV) is fully justified. As the waiver requests show, the licensees qualify for such a waiver pursuant to either the "failed" station or "failing" station standard. Indeed, on two separate, recent occasions, the FCC has granted Tribune permanent waivers of the duopoly rule, and the facts today present an even more compelling case justifying waiver. Finally, the Commission should grant the requested waiver to effectuate its policy of affording comity to the bankruptcy process and to enable Tribune to emerge from bankruptcy as a viable media entity equipped to survive and serve the public interest. In their petition to deny, Petitioners raise two objections to the duopoly waiver request, neither of which has merit.

First, Petitioners incorrectly argue that Tribune does not satisfy the "failed" station standard because WTXX(TV) is not off-the-air or in involuntary bankruptcy.<sup>152</sup> As described above in Section III.B., however, WTXX(TV) qualifies as a "failed" station by virtue of Tribune's bankruptcy. Contrary to Petitioners' objection, that determination is warranted since Tribune obviously did not initiate bankruptcy proceedings for the purposes of maintaining its Hartford duopoly waiver.<sup>153</sup>

Second, Petitioners claim that WTXX(TV) does not qualify as either a "failed" or "failing" station because Tribune has not provided sufficient evidence of its efforts to sell the station to an out-of-market buyer, as required by both the "failed" and "failing" station waiver

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<sup>152</sup> *Id.* at 42.

<sup>153</sup> Tribune has never tried to argue that a "failed station" waiver for WTXX(TV) is appropriate because the station is dark, which it obviously is not.

standards.<sup>154</sup> This challenge fails because the waiver request thoroughly documents the following:

- (1) the Commission itself found that no such buyer existed as of 2007;
- (2) since then, the market for selling CW-affiliated local stations like WTXS(TV) has so deteriorated that no out-of-market buyer is likely to purchase the station at market value; and
- (3) the costs of converting WTXS(TV) to independent operation and operating it as a stand-alone station are too great, further discouraging interest from any out-of-market buyers in today's market.

In short, Tribune demonstrated that any efforts to sell WTXS(TV) to an out-of-market buyer would be futile.

In 2007, the Commission extended Tribune's permanent waiver of the duopoly rule for its Hartford television combination, finding that each of the four "failing" station waiver criteria were met.<sup>155</sup> The Commission specifically determined that no out-of-market buyer was

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<sup>154</sup> *Id.* at 42-43. Petitioners raise no specific objection to Tribune's satisfaction of the other three "failing" station waiver criteria, claiming merely that "[i]t is not clear whether Tribune meets the other tests required for a failing station waiver." Petition n.109. Tribune has submitted more than sufficient information showing that WTXS(TV) satisfies these factors. Petitioners state that they cannot evaluate Tribune's assertion of negative cash flow for the past three years because the underlying financial data was submitted with a request for confidentiality. They ask the Commission to make that information available under a protective order "if . . . the Commission finds that the financial condition of WTXS is material." *Id.* The Commission should deny Petitioners' contingent request for a protective order. If Petitioners wished to have access to WTXS(TV)'s financial information, they should have requested it earlier. Processing of the applications should not be delayed to afford Petitioners an opportunity to examine the information.

<sup>155</sup> *2007 Tribune Order*, 22 FCC Rcd 21,279-81 (¶¶ 37-45). As Petitioners correctly note, Tribune has held a permanent waiver of the duopoly rule for its Hartford television combination since 2001 when the Commission first found WTXS(TV) satisfied the criteria for a "failing" station waiver. *See* Petition at 37 (citing *Counterpoint I*, 16 FCC Rcd at 15046).

reasonably available at that time.<sup>156</sup> In so finding, the Commission approved Tribune's efforts to sell WTXS(TV) between 2001 and 2006.<sup>157</sup>

Petitioners now claim that for the Commission to grant the currently requested waiver, Tribune must show more current examples of efforts to sell the Hartford properties to an out-of-market buyer. Recent Commission decisions show that contention is mistaken<sup>158</sup> For example, in *Davis Television Clarksburg, LLC*, the Commission granted a "failing" station duopoly waiver in 2008 based only on a showing that the licensee had made efforts to sell the station to an out-of-market buyer in July 2003.<sup>159</sup> In that case, the Commission accepted a representation of the licensee's broker that its inability to find an out-of-market buyer five years earlier in 2003 meant that no such buyer could be found.<sup>160</sup> Likewise, in *KSMO License, Inc.*, the Commission granted a "failing" station waiver in September 2005 based on efforts to sell the station that took place almost entirely in 2001 and early 2002.<sup>161</sup>

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<sup>156</sup> 2007 Tribune Order, 22 FCC Rcd at 21,281 (¶ 44).

<sup>157</sup> *Id.* at 21,280-81 (¶¶ 43-44).

<sup>158</sup> See 1999 Duopoly Order, 14 FCC Rcd at 12939-40 (¶ 81).

<sup>159</sup> 23 FCC Rcd 5472, 5474 (¶ 8) (2008) ("*Davis*"); see also Application for Consent To Assignment of Broadcast Station Construction Permit or License, Davis Television of Clarksburg, LLC, FCC File No. BALCT-20070622ABZ, Request for Duopoly Waiver Under Section 73.2555(b) at 6-7 and Attachment B (Declaration of Kelly Callan at ¶¶ 3-6).

<sup>160</sup> *Davis*, 23 FCC Rcd at 5474 (¶ 8).

<sup>161</sup> 20 FCC Rcd 15254, 15257 (2005) ("*KSMO*"); see also Application for Consent To Assignment of Broadcast Station Construction Permit or License, KSMO Licensee, Inc., FCC File No. BALCT-20050107ACA, Request for Duopoly Waiver Under Section 73.3555(b) at 9-11 and Statement of Michael E. Anderson ¶¶ 4-5. In that case, the licensee did entertain a single unsolicited expression of interest in 2004 that did not lead to an offer to purchase the station. *Id.*, Declaration of David B. Amy at ¶ 4.

In the *2007 Tribune Order*, which was issued on November 30, 2007, the Commission approved WTXX(TV)'s "failing" station waiver based on marketing efforts conducted in early 2006 and some additional contacts between Tribune's broker and prospective purchasers in September 2006.<sup>162</sup> Clearly, Tribune's five years of efforts and experience between 2001 and 2006 to locate an out-of-market buyer, which were deemed sufficient by the Commission in 2007, are as recent today as the efforts the Commission found sufficient in *Davis* and *KSMO*.

Moreover, in its waiver request, Tribune provides extensive evidentiary support for the contention that trying to locate an out-of-market buyer for WTXX(TV) would be futile. As Tribune demonstrates, the market for television station transactions, and for CW-affiliated stations like WTXX(TV), in particular, deteriorated significantly from 2007 through 2009.<sup>163</sup> During this period, few CW affiliates were sold, and most of those were sold at distressed prices.<sup>164</sup> This downturn in the industry, coupled with Tribune's previous unsuccessful efforts to sell convinced Tribune's expert that a sale to an out-of-market buyer, if even possible, could not be concluded at a reasonable price. Petitioners do not dispute the massive devastation of the market for television transactions following the 2007 waiver grant. Nor do Petitioners provide any evidence that would compel the FCC to disagree with Tribune's showing.<sup>165</sup>

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<sup>162</sup> *2007 Tribune Order*, 22 FCC Rcd at 21,280-81 (¶ 43); *see also* Application for Consent To Transfer Control of Entity Holding Broadcast Station Construction Permit or License, WTXX, Inc., FCC File No. BTCCT - 20070501AEZ, Request for Failing Station Waiver, Confidential Declaration of Bryan Byrnes at ¶¶ 18-20.

<sup>163</sup> *Id.* at 8-12, 15-17.

<sup>164</sup> *Id.* at 16-17; Byrnes Decl. at ¶¶ 7-11.

<sup>165</sup> Petitioners appear to believe that a ready stable of potential purchasers is standing in line to buy Tribune's Hartford newspaper and/or its stations and operate them as stand-alone properties. The record clearly tells a different story. The record reflects the abysmal market for selling newspapers, *Fratrrik Separation Analysis* at 13-14, and one of Tribune's Hartford competitors suggests that the point of the Hartford "cross-ownership is to prop up the bankrupt

Instead, Petitioners argue that Tribune's waiver request is deficient because the declaration from its expert shows only that, if Tribune tried to sell WTXX(TV), it would be forced to take a loss.<sup>166</sup> But Tribune's evidence, in the form of the Declaration of Brian Byrnes, showed much more than that. Mr. Byrnes stated that he "would be surprised if any buyer came forward" and "that, if one did, such expressions of interest would come only from in-market operators interested in operating the station as part of a duopoly."<sup>167</sup> Thus, Mr. Byrnes concluded that no out-of-market buyer was likely to be available *at all*, let alone one willing to pay a reasonable price for the station. Mr. Byrnes' Declaration shows that since 2007, sale of WTXX(TV) to an out-of-market buyer at a reasonable price has simply not been possible. This demonstration, coupled with the Commission's approval of Tribune's prior efforts to sell the station, satisfies the Commission's requirement that Tribune show efforts to sell the station to an out-of-market buyer. Significantly, Petitioners did not submit any contrary evidence rebutting Mr. Byrnes' opinions.

Petitioners also entirely ignore Tribune's further showing that the potential costs of converting and operating WTXX(TV) as a stand-alone operation would be so prohibitively expensive that they create a major deterrent to any out-of market buyer's purchase of

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Hartford Courant." Petition to Deny of Neil Ellis, MB Docket No. 10-104; FCC File Nos. BALCDT-10100428ADR, BALCDT-10100428ADX, filed June 14, 2010, at 2. While Tribune would vigorously dispute that characterization, the reality is that divestiture of the properties at a fair market value likely would be impossible at this time and the same has been true for much of the ten years the combination has been in existence. Yet during this decade of cross-ownership, Tribune has worked constantly to improve the local news product that each property contributes to the market.

<sup>166</sup> Petition at 43.

<sup>167</sup> Byrnes Decl. at para. 11.

WTXX(TV).<sup>168</sup> This evidence shows that successful operation of WTXX(TV) would be extremely unlikely without the efficiencies of common ownership.<sup>169</sup> As Tribune's expert estimates, the estimated equipment costs alone of converting WTXX(TV) to a stand-alone station would exceed \$1.26 million.<sup>170</sup> These costs and the current financial condition of the Hartford properties overall demonstrate the futility of seeking an out-of-market buyer for WTXX(TV) under current circumstances.

Finally, Petitioners never mention Tribune's extensive evidence of the combination's continued exemplary service to the Hartford and Waterbury markets nor Tribune's contention that a waiver would be consistent with the FCC's policy of affording comity to the bankruptcy process.<sup>171</sup> Both factors weigh heavily in favor of a waiver. Neither can Petitioners claim that continued common ownership would lead to a diminution in competition or diversity in Hartford, since this duopoly has been intact for a decade, and the record shows that the Hartford media market remains vibrantly diverse and competitive. Indeed, as Tribune's expert documents, any attempt to force WTXX(TV) to operate as a stand-alone station would likely result in one less operating voice in the market.<sup>172</sup>

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<sup>168</sup> Hartford Duopoly Waiver Request at 14-15 (citing *Hartford Duopoly Market Analysis* at 11-12 & Appendix 1).

<sup>169</sup> Hartford Duopoly Waiver Request at 15 (citing *Hartford Duopoly Market Analysis* at i, 13-14).

<sup>170</sup> *Id.*

<sup>171</sup> Hartford Duopoly Waiver Request at 22-25.

<sup>172</sup> *Hartford Duopoly Market Analysis* at 11-13.

For all these reasons, the Commission should reject Petitioners' challenge to a continued permanent waiver allowing Tribune to continue to own WTIC-TV and WTXN(TV) in Hartford. The waiver request should be granted.

**IV. AT A MINIMUM, TRIBUNE'S CHICAGO AND HARTFORD COMBINATIONS ARE ENTITLED TO TEMPORARY WAIVER UNTIL 18 MONTHS AFTER THE FCC'S MULTIPLE OWNERSHIP PARAMETERS ARE ESTABLISHED WITH FINALITY.**

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As Tribune documents in its waiver requests, the history of Commission attempts to revise its media ownership rules have been exceedingly long and tortured.<sup>173</sup> Throughout this period, companies like Tribune have tried to pursue business models that they believe improve their ability to bring increased local and diverse content to their markets. They have found their efforts challenged by the extreme regulatory uncertainty and multiple changes in governing standards that never reach certainty or finality, despite Congressional intent that such periodic reviews proceed apace.

To address the need for temporary waivers in such situations, the FCC has long applied a three-part test, consisting of the following elements: (1) a substantial record already exists in protracted proceedings related to media ownership review; (2) the requested waivers are within the scope of the proposals in the proceedings; and (3) grant of the waivers would be consistent with the Commission's goals of diversity, localism, and competition.<sup>174</sup> The waiver requests show this test is met in both Chicago and Hartford, justifying Tribune's request for a temporary waiver until 18 months after proceedings concerning the FCC's multiple ownership rules are

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<sup>173</sup> See Chicago Cross-Ownership Waiver Request at 6-19, 127-128; Hartford Cross-Ownership Waiver Request at 5-17, 117.

<sup>174</sup> See Chicago Cross-Ownership Waiver Request at 124-125; Hartford Cross-Ownership Waiver Request at 113-115 (citing *1998 Biennial Regulatory Review*, Notice of Inquiry, 13 FCC Rcd 11,276, 11,294 (¶ 57) (1998); *WAIT Radio*, 418 F.2d at 1157).

concluded. Thus, if the FCC decides permanent relief is unwarranted, principles of administrative fairness and comity with the bankruptcy process clearly support extending temporary relief to Tribune so that it is not forced to make changes that would later be rendered unnecessary, solely due to its emergence from bankruptcy protection.

**A. The Requested Waivers Meet the Applicable Standards.**

**1. Protracted Proceedings.**

The first element of the three part test is whether a substantial record already exists in protracted proceedings supporting “a preliminary inclination to relax or eliminate” the NBCO Rule. Petitioners do not contest – nor could they – that this element is met. Tribune’s waiver requests detail the nearly 15-year history of the Commission’s efforts to reevaluate the NBCO Rule in the context of a rapidly changing marketplace, and those efforts are ongoing. The *2010 Media Ownership NOI* is the Commission’s latest step in this process.<sup>175</sup> The *NOI* confirms that the 2010 Quadrennial Review proceeding again, among other things, will consider proposals for modifying or eliminating the NBCO Rule.<sup>176</sup> Indeed, to the extent the 2010 Quadrennial Review will incorporate reconsideration requests from the 2006 Quadrennial Review, the 2010 proceeding also will effectively be a continuation of that proceeding. In fact, as the *2010 Media Ownership NOI* notes, the Commission already has built on its field hearing experiences from the 2006 Quadrennial Review by holding public workshops beginning in November 2009 and compiling a record based on those sessions. The protracted proceedings continue.<sup>177</sup>

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<sup>175</sup> See generally *2010 Media Ownership NOI*, MB Docket No. 09-182, FCC 10-92.

<sup>176</sup> *Id.* at ¶ 87.

<sup>177</sup> *Id.* at n.32.

## 2. Requested Waiver Within Scope of Proceedings.

The second element – whether the requested waiver is within the scope of the issues being considered in the 2010 Quadrennial Review – is also easily met.<sup>178</sup> The waiver standards are an integral part of the *2008 Media Ownership Order*, and the propriety of any waiver is necessarily related to the reconsideration of that decision which will be part of the 2010 Quadrennial Review. The new NOI will also go forward with a new, independent review of these factors.

## 3. Consistency of Waiver with Commission Goals.

As described above, Petitioners have failed to demonstrate that grant of the requested waiver would compromise the Commission's policies underlying the NBCO Rule. Their grant would simply continue the *status quo* and assist Tribune's emergence from bankruptcy. Continuing these combinations, as the Commission has previously found, are consistent with the public interest and result in increased local news and diverse information in each of its markets. Temporary waivers are therefore justified under the third factor of the Commission's temporary waiver standard.

### **B. Petitioners' Objections to the Requested Temporary Waiver Are Unsupportable.**

Petitioners advance several meritless arguments in an attempt to undermine Tribune's request for temporary waivers. If accepted, their contentions would lead to wholly unacceptable and unnecessary disruption to the on-going operations of a well-established media company trying to emerge from bankruptcy.

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<sup>178</sup>

*Id.* ¶ 87.

Granting the temporary relief Tribune seeks would not, as Petitioners claim, “eviscerate the media ownership rules.”<sup>179</sup> The Commission’s temporary waiver standards provide the Commission with a sound basis for case-by-case review of existing NBCO waivers during the pendency of its reevaluation of the rule. For that reason, Petitioners are simply wrong that granting the relief Tribune requested would require grant of other applicants’ requests for temporary relief from the NBCO Rule.

Petitioners also complain that Tribune is improperly seeking to rely on the current depressed state of the newspaper and television marketplace in support of temporary waivers.<sup>180</sup> The *2010 Media Ownership NOI*, however, demonstrates that the Commission believes that the state of the media marketplace should be a main focus of the 2010 Quadrennial Review and the starting point for revision of its media ownership rules.<sup>181</sup>

Finally, Petitioners’ claim that the length of Tribune’s requested waiver is “outrageously outsized” is simply wrong. The Commission’s reevaluation of the NBCO Rule has gone on for nearly fifteen years; Tribune has been in bankruptcy for nearly two years; turmoil continues to disrupt the newspaper and television industries; and Tribune’s cross-ownership combinations have been in place for many years – 60 years in Chicago and a decade in Hartford – and have had no negative effect on competition or diversity in its markets. This combination of an unsettled market, a regulatory regime in flux, and Tribune’s long-standing cross-ownership interests that advance localism strongly supports the temporary relief Tribune seeks.

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<sup>179</sup> Petition at 50-51.

<sup>180</sup> *Id.* at 51.

<sup>181</sup> *2010 Media Ownership NOI* at ¶ 14.

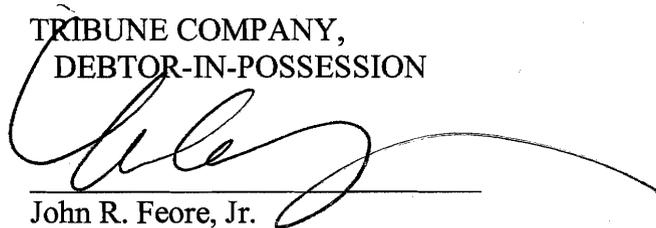
In this case, the Commission's temporary waiver standards are clearly met, and Petitioners provide no justification for denying relief. Consistent with the Commission original *1975 Order*, Tribune has shown that the "purposes of the rule would be disserved by divestiture" and in fact, "would be better served by the continuation of the current ownership pattern."<sup>182</sup> The requested temporary relief therefore should be granted.

V. **CONCLUSION.**

For the foregoing reasons, the Petition should be denied, and the Exit Applications processed expeditiously and granted, along with the requested waivers, once the bankruptcy court issues plan confirmation.

Respectfully submitted,

TRIBUNE COMPANY,  
DEBTOR-IN-POSSESSION



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June 29, 2010

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<sup>182</sup> See *1975 Order*, 50 F.C.C.2d at 1085 (¶ 119).

**CERTIFICATE OF SERVICE**

I, Tammi Foxwell, hereby certify that on this 29<sup>th</sup> day of June, 2010, a copy of the foregoing Opposition to Petition to Deny of Free Press, Media Alliance, NABET/CWA, National Hispanic Media Coalition, Office of Communication of the United Church of Christ, Inc., and Charles Benton was served by first-class mail, postage prepaid, upon the following:

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In addition, I have provided a courtesy copy of this Opposition via email to Andrew Jay Schwartzman ([andys@mediaaccess.org](mailto:andys@mediaaccess.org)), Angela J. Campbell ([campbeaj@law.georgetown.edu](mailto:campbeaj@law.georgetown.edu)), and to all individuals listed below.

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A handwritten signature in cursive script that reads "Tammi Foxwell". The signature is written in black ink and is positioned above a horizontal line.

Tammi Foxwell