

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554**

In the Matter of:)	
)	
Applications of Tribune Company)	
and its Licensee Subsidiaries)	MB Docket No. 10-104
)	
For Consent to Assignment of)	
Broadcast Station Licenses)	

**Reply of Petitioner Wilmington Trust Company, as Successor Indenture Trustee,
to the Opposition to Petition to Deny [of Tribune Company];
to the Consolidated Opposition to Petitions to Deny of JP Morgan Chase Bank, N.A.; and
to the Memorandum of the Official Creditors Committee of Unsecured Creditors**

Wilmington Trust Company (“Wilmington Trust”), the Successor Indenture Trustee for \$1.2 billion principal Exchangeable Subordinated Debentures due 2029 issued by Tribune Company (with its Licensee Subsidiaries, collectively, “Tribune” or the “Applicants”), by and through its undersigned counsel, respectfully submits this Reply to the Opposition to Petition to Deny filed by Tribune Company, Debtor-in-Possession (“Tribune Opposition”); to the Consolidated Opposition to Petitions to Deny filed by JP Morgan Chase Bank, N.A., as Administrative Agent Under the Tribune Company Credit Agreement dated May 17, 2007 (“JP Morgan Opposition”); and to the Memorandum of the Official Creditors Committee of Unsecured Creditors of Tribune Company (“Creditor’s Committee Opposition”). Nothing in any of these filings, separately or collectively, provides a basis for the Commission to approve Tribune’s Applications for Consent to Assignment of Broadcast Station Licenses (FCC Form 314) (the “Exit Applications”). As discussed in Wilmington Trust’s Petition to Deny (the “Petition”) and below, the Exit Applications are missing critical information that precludes their being granted because the Commission cannot affirmatively determine that a grant would be

consistent with the public interest, convenience and necessity, as required by the Communications Act of 1934, as amended, 47 U.S.C. § 309(a) and 47 C.F.R. § 73.3591(a). Contrary to the arguments of Tribune and its allies, the Applicants have not provided sufficient information regarding Tribune's contemplated ownership structure, particularly potential foreign ownership, to permit the Commission's review and approval; indeed, their arguments are based on outdated case law that predates the heightened review standard announced by the Commission in *Fox Television Stations, Inc.*, 10 F.C.C. Rcd 8452 (1995) ("*Fox I*") and *Fox Television Stations, Inc.*, 11 F.C.C. Rcd 5714, 5719 (1995) ("*Fox II*").

Discussion

I. TRIBUNE HAS NOT DISCLOSED SUFFICIENT INFORMATION TO PERMIT THE COMMISSION TO DETERMINE THAT TRIBUNE'S PROPOSED OWNERSHIP STRUCTURE SATISFIES THE FOREIGN OWNERSHIP RESTRICTIONS IN THE COMMUNICATIONS ACT

Tribune states that "[i]f necessary to ensure compliance with the 25% foreign ownership and voting rights benchmarks in Section 310(b)(4), Tribune will distribute either a combination of warrants and stocks or warrants alone to claimants with foreign ownership or foreign voting rights above 25%." Tribune Opposition at 11. Tribune asserts that "Wilmington Trust acknowledges" that warrants are not relevant to the Commission's foreign ownership calculations unless exercised. *Id.*

It is telling that Tribune does not cite where Wilmington Trust supposedly acknowledged this. Not only has Wilmington Trust not acknowledged that warrants are not relevant to the Commission's calculations, Wilmington Trust's Petition argued strongly that Tribune's plan to issue warrants should not be approved by the Commission. Petition at 17-19.

Nor do the Commission decisions which Tribune cites in footnote 14 on pages 11-12 of its Opposition support Tribune's position. Significantly, those decisions predate the *Fox I* and

Fox II decisions. As discussed below, Tribune’s “trust me” approach to compliance with Section 310(b)(4) does not satisfy the requirements of the *Fox* line of cases.

In *Fox I*, the Commission was presented with an applicant in which 99% of the equity capital had been contributed by a foreign corporation in exchange for 24% of the voting stock. The remaining 76% of voting stock was held by a U.S. citizen who had contributed only one percent of the equity. This structure clearly was designed to avoid the 25% limitation on foreign ownership and, arguably, the structure did comply with the letter of Section 310(b)(4). However, the Commission stated:

In these circumstances, we conclude that the statute requires us to evaluate not only the number of shares of stock held by alien owners, but also the amount of equity capital contributed by such owners. Such an approach effectuates the statutory objective, and will enable the Commission to perform a *bona fide* analysis of alien ownership.

Fox I, *supra* 10 F.C.C. Rcd at 8456; *see also id.* at 8473 (“[I]t is evident from the legislative history of section 310(b)(4) that Congress intended the Commission to undertake a *bona fide* assessment of the extent of foreign ownership interests in corporations.”). The Commission continued:

FTS [*i.e.*, Fox] argues that the ownership benchmark percentage can only be computed by counting the number of shares of stock (regardless of class, voting rights, or relative value) that is owned of record by an alien individual or corporation, and then comparing that number to the total number of outstanding shares of stock issued by the corporation. . . . We agree with FTS that, in some contexts, counting the number of shares of outstanding stock owned of record by aliens yields an accurate assessment of the extent of alien ownership interests in a corporation. . . . We do not agree, however, that in all circumstances the method FTS advocates for determining ownership interests comports with common sense or congressional intent.

Id. at 8467. The Commission explained:

Using a simple “count the shares” approach may not accurately reflect the actual extent of alien ownership interests in a

corporation, particularly when the corporation issues more than one class of stock, and those classes have widely divergent characteristics. . . . [T]he language of the statute and its legislative history amply support the proposition that in enacting Section 310(b) Congress was concerned with the extent of alien beneficial interests, both in licensees and parent companies that control licensees. . . . Thus, for example, in [*Wilner & Scheiner*] *Reconsideration Order* [1 FCC Rcd 12 (1986)], we concluded that non-voting preferred stock “owned” by alien interests must be counted toward evaluating the benchmark, even if that stock possesses “none of the indicia normally associated with equity ownership.”

Id. at 8468 (footnote omitted).

It does not matter what Tribune proposes to call the interests it distributes or what characteristics they have, since the Commission has made clear that the issue of ownership is separate from the issue of control:

[T]he benchmark restriction on alien ownership was an independent restriction on ownership of capital stock, even where such ownership does not confer control. . . . Therefore, in the absence of any express indication that Congress intended to constrain our authority, we conclude that Congress intended for us to construe the benchmark standard in a manner that allows for a meaningful assessment of alien ownership interests in corporate licensees and parent companies.

Id. at 8470-71.

In light of the above, it is indisputable that all types of interests, including the warrants proposed by Tribune, must be considered by the Commission to determine whether the foreign ownership standards in the Communications Act are being exceeded. And, it follows that there is no merit to Tribune’s assertion that it does not have to disclose its non-attributable owners or prospective warrant-recipients to the Commission, as the Commission has stated:

It is clear that Section 310(b)(4) gives the Commission discretion with respect to alien ownership in excess of the statutory benchmark. It is equally clear that the statute requires that the Commission be made aware whenever foreign ownership could exceed the benchmark level, so that it can exercise that discretion. . . . If the Commission is to exercise its discretion in

any meaningful way, it must be alert to the fact that such discretion is at issue, and given sufficient facts upon which to make the case-by-case analysis required.

Id. at 8474-75.

An applicant's failure to make full disclosure of potential foreign ownership could be found by the Commission to constitute a breach of the duty of candor that applicants owe the Commission. The Commission has explained:

[T]he Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. . . . The duty of candor requires an applicant before the FCC to be fully forthcoming as to all facts and information relevant to its application. Relevant information is defined as information that may be of decisional significance. The duty of candor can be breached both by affirmative misrepresentations and by a failure to come forward with a candid statement of relevant facts, whether or not such information is particularly elicited by the Commission or its staff.

Id. at 8478 (citations and internal quotation marks omitted).¹

Based on the above analysis, the Commission concluded in *Fox I* that a structure cleverly designed to avoid the 25% limitation on foreign ownership while complying with the letter of Section 310(b)(4) did not, in fact, satisfy the requirements of that statute. Subsequently, in *Fox II*, the Commission reviewed the restructured organization of the applicant. There the Commission stated:

[I]n assessing compliance with Section 310(b), we must examine the economic realities of the transactions under review and not simply the labels attached by the parties to their corporate

¹ This formulation by the Commission of the duty of candor is relevant not only to the foreign ownership issue but also to Tribune's failure initially to advise the Commission of the motion for appointment of the Examiner.

This lack of candor is only one of the character fitness issues which the Commission must consider. As Tribune admits on page 5 of its Opposition, the Examiner's report could result in "future 'character' issues."

incidents. . . . We take this opportunity to emphasize that we apply an analysis based on the economic realities of the situation to any proposed transaction to which a distinction between debt and equity is pertinent.

Fox II, supra 11 F.C.C. Rcd at 5719.

Here, too, the Commission cannot simply look at the labels that Tribune attaches to the interests it hands out to its creditors, nor can the Commission rely on a simple “count the shares” approach that may not accurately reflect the actual extent of alien ownership interests in Reorganized Tribune. Whether the piece of paper says “Stock” or “Warrant” in its caption, the fact remains that it is evidence of an ownership interest which the Commission must consider in analyzing the Applicant’s compliance with the foreign ownership restrictions of Section 310(b)(4). And, since Tribune has not provided sufficient information to enable the Commission to perform that analysis, the Exit Applications should not be approved.

II. THE “CLASS B” STOCK WITH LIMITED VOTING RIGHTS PROPOSED BY TRIBUNE CANNOT AND WILL NOT BE APPROVED BY THE BANKRUPTCY COURT.

In their Oppositions, Tribune and its allies cite several cases which they assert support the proposition that a Bankruptcy Court, including the judge presiding over the Tribune proceedings, can and will approve the issuance of Class B shares with limited voting rights. In fact, each of the cases cited is readily distinguishable from the present case.

In re Citadel Broadcasting Corp., Case No. 09-17442 (Bankr. S.D.N.Y.), was a so-called “prepackaged” bankruptcy with the first plan of reorganization filed a mere two months after the Debtor filed for bankruptcy. Citadel’s plan of reorganization included the issuance of Class B “limited-voting” common stock, and the plan regulated ownership of the stock in accordance with the Commission’s cross- and multiple ownership rules. *See Second Modified Joint Plan*, pp.3-4, 55-56 [Docket No. 336]. None of the five objections to the plan raised the legality of the

plan in light of Bankruptcy Code Section 1123(a)(6); thus, the issue was not litigated in *Citadel Broadcasting Corp.*, and the court's confirmation of the plan has no more precedential value than a settlement would have. In fact, not even the parties in the *Citadel Broadcasting Corp.* proceedings would be estopped from arguing the contrary in a later proceeding. *Cf. In re Bankvest Capital Corp.*, 375 F.3d 51, 60 (1st Cir. 2004) (Settlement approved by Bankruptcy Court does not create estoppel because "At no time did the bankruptcy court accept the legal or factual assertions of the complaint.")

Similarly, the other cases cited by Tribune and its allies -- *In re ION Media Networks, Inc., et al.*, Case No. 09-13125 (Bankr. S.D.N.Y.), *In re NextMedia Group*, Case No. 09-14463 (Bankr. D. Del), and *Affiliated Media, Inc.*, Case No. 10-10202 (Bankr. D. Del.) (the case heard by the same judge as the Tribune matter) -- all were pre-negotiated or effectively unopposed cases in which the first plan of reorganization was filed in short order after the debtor filed for bankruptcy. As in *Citadel Broadcasting Corp.*, no one challenged the legality of any of the plans under Section 1123(a)(6); thus, the issue was never ruled upon, and those cases provide no precedent for the heavily contested Tribune bankruptcy or for this proceeding.²

III. WILMINGTON TRUST HAS STANDING TO FILE A PETITION TO DENY.

In a footnote on page 11 of the JP Morgan Opposition, the suggestion is made that Wilmington Trust does not have standing to oppose the Exit Applications. In particular, JP Morgan cites *WLVA, Inc. v. FCC*³ for the proposition that Wilmington Trust "cannot point to any cognizable injuries that can be redressed by an FCC decision in this proceeding." That standard applies to licensing proceedings, not to applications for Commission consent to private

² In the cases of *Citadel Broadcasting Corp.* and *NextMedia Group*, it appears that the proceedings before the Commission were likewise unopposed.

³ 459 F.2d 1286, 1298 n.36 (D.C. Cir. 1972).

transactions involving licensee ownership changes.⁴ In the same footnote cited by JP Morgan, the Court noted that “where a competitor of the applicant seeks to intervene, standing is liberally conferred. *See, e. g., Big Basin Radio*, 10 F.C.C. 2d 209, 11 Pike & Fischer R.R. 2d 368 (1967); *Voice of Middlebury*, [3 F.C.C. 2d 512, *reconsideration denied*, 4 F.C.C. 2d 995 (1966)].”

Would the Commission consider the economic interest of a competitor and grant it standing, yet decline to consider the economic interest of an interest holder in the licensee and deny it the right to be heard? That would be unreasonable.⁵

Tribune and its allies argue that Wilmington Trust has no stake in this matter because it represents “deeply subordinated unsecured creditors.” *See, e.g., JP Morgan Opposition* at 11, fn.16. But this is an admission that Wilmington Trust has an interest--just not, in JP Morgan’s biased opinion, a strong one. The Commission, however, does not grant standing to an interest holder based upon a value assessment of its interest. Wilmington Trust has standing in this proceeding.

Conclusion

For the reasons discussed in Wilmington Trust’s Petition and above, the Commission should not approve the Exit Applications at this time. The Commission should not allow itself to be used by Tribune and its allies to do an end-run around the Bankruptcy Court. As discussed in the Petition, that court is considering the legality and fairness of the proposed Reorganization Plan and the Examiner appointed by the Bankruptcy Court is investigating possible wrongful

⁴ *WLVA, Inc.*, was one of many cases decided in the shadow of *Carroll Broadcasting Co. v. F.C.C.*, 258 F.2d 440 (1958), involving FCC consideration of the economic impact of new stations in a market. The court instructed that “a petitioner seeking a hearing on the *Carroll* issue must plead specific factual data sufficient to make out a *prima facie* case that the economic consequences of a grant of the challenged application will lead to an overall derogation of service to the public.” *Id.*, at 1297.

⁵ Indeed, the Commission and Courts have allowed a party with no present interest to be heard. *See, e.g., Kidd Communications v. FCC*, 427 F.3d 1 (D.C. Cir. 2005).

actions by various persons and entities who are now seeking Commission approval to own and operate the broadcast licenses. Nor should the Commission overlook the apparent lack of candor by the applicants. Rather, the Commission should decline to consider the applications until the Bankruptcy Court has finally determined who the owners of Reorganized Tribune will be.

Respectfully submitted,

BROWN RUDNICK LLP

By: /s/ Kenneth B. Weckstein

Kenneth B. Weckstein, Esq.
601 Thirteenth Street, N.W., Suite 600
Washington D.C. 20005
Telephone: (202) 536-1700
Facsimile: (202) 536-1701
Email: kweckstein@brownrudnick.com

and

BROWN RUDNICK LLP
Robert J. Stark, Esq.
Martin S. Siegel, Esq.
William M. Dolan III, Esq.
Seven Times Square
New York, New York 10036
Telephone: (212) 209-4800
Facsimile: (212) 209-4801
Email: rstark@brownrudnick.com
Email: msiegel@brownrudnick.com
Email: wdolan@brownrudnick.com

and

GARVEY SCHUBERT BARER
John Wells King
1000 Potomac Street N.W.
Fifth Floor
Washington, D.C. 20007-3501
Telephone: (202) 965-7880 x2520
Facsimile: (202) 965-1729
Email: JKing@gsblaw.com

*Counsel to Wilmington Trust Company, as
Successor Indenture Trustee for the \$1.2 Billion
Exchangeable Subordinated Debentures Due 2029,
Generally Referred to as the PHONES*

Certificate of Service

I, Gia Madeleine Montserrat, hereby certify that on this 12th day of July 2010, I caused a copy of the foregoing pleading titled “Reply of Wilmington Trust Company etc.” to be served by first class U.S. mail, postage prepaid, or *by email delivery, to the following:

John R. Feore, Jr., Esquire
Dow Lohnes PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington DC 20036
Counsel for Tribune Company

Richard E. Wiley, Esquire
Wiley Rein LLP
1776 K Street, N.W.
Washington DC 20006
Counsel for JP Morgan

James A. Stenger, Esquire
Chadbourne & Parke LLP
1200 New Hampshire Avenue, N.W.
Washington DC 20036
Counsel for the Official Committee
of Unsecured Creditors

Andrew Jay Schwartzman, Esquire
Media Access Project
1625 K Street, N.W.
Suite 1000
Washington DC 20006
Counsel for Public Interest Parties

Angela J. Campbell, Esquire
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington DC 20001
Counsel for Public Interest Parties

Stanley M. Brand, Esquire
Brand Law Group PC
923 15th Street, N.W.
Washington DC 20005
Counsel for Neil Ellis

Bradley T. Raymond, Esquire
International Brotherhood of Teamsters
25 Louisiana Avenue, N.W.
Washington DC 20001
Counsel for International
Brotherhood of Teamsters

The Honorable Julius Genachowski,
Chairman
Federal Communications Commission
445 12th Street SW
Washington DC 20554

The Honorable Michael J. Copps
Federal Communications Commission
445 12th Street SW
Washington DC 20554

The Honorable Robert M. McDowell
Federal Communications Commission
445 12th Street SW
Washington DC 20554

The Honorable Mignon Clyburn
Federal Communications Commission
445 12th Street SW
Washington DC 20554

The Honorable Meredith Attwell Baker
Federal Communications Commission
445 12th Street SW
Washington DC 20554

David N. Roberts, Esquire*
Video Division
Room 2-A728
Media Bureau
Federal Communications Commission
Washington DC 20554
[To: David.Roberts@fcc.gov]

/s/ Gia Madeleine Montserrat