Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Voluntary Assignment of Licenses of the Tribune Co. and Licensee Subsidiaries	))	MB Docket No. 10-104

REPLY TO OPPOSITION TO PETITION TO DENY

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SUMMARY

Petitioners Free Press, Media Alliance, NABET/CWA, National Hispanic Media Coalition, Office of Communication of the United Church of Christ, Inc., and Charles Benton (collectively "Public Interest Petitioners") reply to the Opposition filed by Tribune.

In its Opposition, Tribune misconstrues the purpose of the Newspaper-Broadcast Cross-Ownership Rule. Tribune's requests for waivers that seek to "maintain the status quo" should be denied. The rule is intended to promote competition, and to increase diversity over time, not to maintain the status quo.

Tribune's opposition fails to reverse or rebut the presumption that its cross-ownerships are not in the public interest. Throughout its opposition, Tribune inappropriately attempts to shift the burden of proof to Petitioners. Tribune has a "high hurdle" to overcome the presumption, and must do so with "clear and convincing" evidence.

Tribune’s showing does not come close to meeting this standard. It has not, and cannot, show a commitment to increasing local news. Its future ownership, management and board membership are unspecified. Tribune is uniquely concerned with allowing future transfers of these properties, evidencing a concern for the private interests of its financiers rather than the public interest. Nor has Tribune shown that its properties qualify as failed or failing. The test is a strict one, and is aimed at preventing stations from going off the air. Tribune's broadcast stations and newspapers continue to operate, and post-bankruptcy their debt burden will be significantly lower. Tribune has also failed to demonstrate that its newspaper and broadcast outlets maintain their own separate news and editorial staff. For example, in Hartford, Tribune has one person who is both the general manager of both television stations and publisher of the *Courant,* and a single Director of Content responsible for the television stations, newspaper and websites.

The Commission should grant the pending petition for reconsideration of the license transfers to Zell. Tribune's "hyper-technical" arguments concerning *pro-forma* license transfers do not moot this petition. Otherwise, the Commission should deny Tribune's requested waivers, both permanent and temporary. As shown, Tribune has failed to reverse or rebut the presumption that its holdings in violation of the NBCO rule are not in the public interest. Further, Tribune's invented "three part test" for a temporary waiver should be rejected. At a minimum, the Commission should hold the requests in abeyance until the bankruptcy proceeding is finished, as the transaction may not be approved by the court. When a transaction is approved, the Commission will be able to better determine the financial condition and control of the media properties.

TABLE OF CONTENTS

Summary i

Table Of Contents iii

Reply 1

I. TRIBUNE MISCONSTRUES THE PURPOSE OF THE CROSS OWNERSHIP LIMIT 1

II. TRIBUNE HAS FAILED TO REVERSE OR REBUT THE PRESUMPTION THAT THE CHICAGO AND HARTFORD CROSS-OWNERSHIPS ARE CONTRARY TO THE PUBLIC INTEREST 2

- A. Tribune Misunderstands Its Burden to Overcome the Negative Presumption 3
- B. Tribune Has Not Committed to Increase Local News 4
- C. Tribune Has Not Shown its Stations Meet the Failed or Failing Station Test 5
- D. Tribune Does Not Show Independent News Judgment 6

III. REQUESTS FOR RELIEF 8

- A. The Commission Should Grant the Pending Petition for Reconsideration of the Transfer of Control to Zell 9
- B. The Commission Should Deny Tribune's Requests for Both Permanent Waivers and Temporary Waivers 10
- C. At a Minimum, The Commission Should Await the Bankruptcy Court 12

CONCLUSION 12

REPLY

Petitioners Free Press, Media Alliance, NABET/CWA, National Hispanic Media Coalition, Office of Communication of the United Church of Christ, Inc., and Charles Benton (collectively "Public Interest Petitioners"[1]), by their attorneys, the Institute for Public Representation and Media Access Project, reply to the Opposition filed by Tribune.

I. TRIBUNE MISCONSTRUES THE PURPOSE OF THE CROSS OWNERSHIP LIMIT

Tribune's oft-repeated mantra, that the Commission must grant a permanent waiver to "maintain the status quo," misrepresents the purpose of the NBCO rule.[2] The NBCO rule was created not to maintain the status quo, but to improve it. The Commission acknowledged the *status quo* by grandfathering all but the most egregious existing combinations, but concluded that "any new licensing should be expected to add to local diversity."[3] It specifically stated that the rule would "apply to all applications for assignment or transfer" except for *pro forma* transfers

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[1] The Public Interest Petitioners collectively have party-in-interest standing in all five of the markets in this transaction where the NBCO and duopoly rule apply. Petitioners' declarations show both residence and audience basis for standing in all five of the markets. *Chet-5 Broadcasting, L.P.* 14 FCC Rcd. 13041,13042 (1991) ("we will accord party-in-interest status to a petitioner who demonstrates either residence in the station's service area *or* that the petitioner listens to or views the station regularly, and that such listening or viewing is not the result of transient contacts with the station."). Tribune carps over which specific petitioner has standing in which specific market, but ultimately, Tribune does not challenge that Public Interest Petitioners collectively have satisfied minimum standing requirements in all of the markets. Tribune Company, Debtor-in-Possession, 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 at 7 n.12, MB Dkt. 10-104 (June 29, 2010)(hereinafter "Opp.").

[2] *See e.g.* Opp. at 58.

[3] *Amendment of Sections 73.34, 73.240, And 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, 50 FCC 2d 1046, 1075 (1975) ("*1975 Order*"), *aff'd sub nom. FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978).

and transfers to heirs.[4] In this way, the Commission anticipated that diversity and competition would be promoted over time.[5]

Tribune also argues that divestiture would cause disruption. But the Commission fully considered the potential for disruption in adopting the NBCO rule and concluded that the prospective application of the rules, in contrast to requiring divestiture, did not impose undue disruption or hardship.[6] Here, it is especially relevant that all of Tribune's cross-ownerships, except Chicago, were created when the 1975 NBCO rule was in effect. That rule "prohibit[ed] the grant of a renewal to any station which acquires a [daily] newspaper."[7] Thus, to the extent that denying transfer of the combinations as a unit causes disruption, the disruption is caused by Tribune's failure to comply with the rule in the first instance.

II. TRIBUNE HAS FAILED TO REVERSE OR REBUT THE PRESUMPTION THAT THE CHICAGO AND HARTFORD CROSS-OWNERSHIPS ARE CONTRARY TO THE PUBLIC INTEREST

Under the NBCO rule as recently revised, Tribune's cross-ownerships in Hartford and Chicago are presumed contrary to the public interest. To reverse the presumption under the failed station test, the applicant must show that "the newspaper or broadcast outlet has to have stopped circulating or have been dark for at least four months immediately prior to the filing of the assignment or transfer of control application, or must be involved in court-supervised *involuntary* bankruptcy or involuntary insolvency proceedings."[8] To reverse the negative

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[4] Id. at 1076.
[5] Id. at 1075-76.
[6] Id. at 1078.
[7] Id. at 1076.
[8] *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,*

presumption under the "substantial news test," Tribune would have to show that the "combination is with a broadcast station that was not offering local newscasts prior to the combination, and the station will initiate at least seven hours per week of local news programming after the combination."[9] In considering whether an applicant has made a clear and convincing showing to overcome the presumption that the combination is not in the public interest, the Commission considers the four factors set forth in 47 CFR § 73.3555(d)(5).

Tribune has not met its burden to reverse or rebut the presumption. Instead, Tribune tries to shift the burden of proof to Petitioners. Tribune does not commit to providing more local news, substantial or not. Tribune does not show that its stations meet the requirements for a "failed or failing" station waiver, nor does it show that its co-located and co-staffed properties are editorially independent.

A. Tribune Misunderstands Its Burden to Overcome the Negative Presumption

Tribune has a high burden to overcome the negative presumption by clear and convincing evidence. The Commission's 2008 Order states: "To the extent that a proposed combination does not qualify for a positive presumption, it will have a high hurdle to cross to win Commission approval."[10] The elements in the four-factor test must be shown by "clear and convincing evidence."[11]

Throughout its Opposition, Tribune incorrectly attempts to shift the burden of proof to Petitioners. The Opposition argues that "[p]etitioners quibble with, but do not successfully

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Report and Order, 23 FCC Rcd 2010, 2048 (2008) (*2008 Order*).
[9] 47 CFR §73.3555(d)(7)(ii).
[10] 2008 Order, 23 FCC Rcd at 2049.
[11] 47 CFR § 73.3555(d)(6).

refute" Tribune's showings on the four factors.[12] Elsewhere, Tribune states that "Petitioners have failed to demonstrate" that granting the waivers would compromise Commission policies underlying the NBCO rule.[13] In another section, petitioners point to lack of guarantees of future investment in newsroom operations, and Tribune calls this "entirely speculative."[14]

This shifting of the burden misconstrues the standard. Tribune has to meet its "high hurdle" of providing "clear and convincing" evidence to rebut the presumption that its cross-owned combinations in Chicago and Hartford are not in the public interest. Thus, when Petitioners point to failures of Tribune to meet its burden, this is not "speculation" but an actual flaw in Tribune's waiver application. Petitioners do not have to "refute" Tribune's claims under the four factors. The presumption is that these waivers are not in the public interest. Tribune has the high hurdle to "clearly and convincingly" rebut this.

B. Tribune Has Not Committed to Increase Local News

Tribune has not made any commitment, much less a substantial one, to increase local news. Indeed, Tribune's application has not even identified who will be in control after the bankruptcy. As its amended application states, the Board of Directors of post-bankruptcy Tribune has not yet been identified.[15] The only shareholder interests identified in the application are JPMorgan Chase Bank, N.A., Angelo, Gordon & Co. L.P., and Oaktree Tribune, L.P.[16] These financial entities represent 30% of the equity shares. The remaining 70% of shareholdings are not specified, other than the claim that they represent "various non-attributable investors."[17]

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[12] Opp. at 6.
[13] Opp. at 58.
[14] Opp. at 39.
[15] WGN Late June 2010 Amendment, Comprehensive Exhibit, MB Docket No. 10-104, June 25, 2010, at 4 ("*Comprehensive Exhibit*").
[16] Id. at 14.
[17] Id. at 15.

Tribune makes no commitment to invest in improving local news. Tribune's Opposition states that "to the extent Tribune management is contemplating any changes in the market related to news, those changes, if any, would enhance the news operation."[18] This vague assertion is in reality no commitment at all.

Tribune's unique concern with being able to quickly transfer its properties in tandem is an indicator of a lack of concern for future news operations.[19] This evidences that the proposed owners – three financial holding companies and unknown shareholders – will not be concerned with running broadcast stations in the public interest, but in treating these properties as financial entities to be chopped and transferred. Tribune itself explains that these extraordinary requests are for "company-wide flexibility" and to "maximize value."[20] These are the concerns of an investor seeking maximum flexibility in how they can repackage and transfer the entities they own. These are not the concerns of someone operating a broadcast station in the public interest.

C. Tribune Has Not Shown its Stations Meet the Failed or Failing Station Test.

Tribune concedes that the failed station exception, as written, applies only to involuntary bankruptcies, but complains that a "hyper-technical application of the 'failed' property test" would be contrary to the public interest.[21] The failed station test is a strict one that intended to allow cross ownership only when needed to relieve a station in such financial distress that it "hampers their ability to be a viable 'voice' in the market."[22] Yet, Tribune goes to great lengths describing the accomplishments of its properties.[23] Failing stations "rarely have the resources to

[18] Opp. at 40.
[19] *See* Opp. at 22.
[20] Opp. at 22.
[21] Opp. at 25.
[22] 2008 Order, 23 FCC Rcd at 2048.
[23] See, e.g., Hartford Cross-Ownership Waiver Request, at 37.

provide local news programming and often struggle to provide significant local programming at all."[24] Moreover, Tribune never suggests that any of the stations or newspapers will cease operating. As Petitioners pointed out, just last August Tribune's COO told employees that Tribune's "business units, including all of our newspapers are profitable."[25] Tribune does not deny this fact in its Opposition.

Instead, Tribune contends that it "has shown that any negative presumption should be reversed in both markets because both combinations qualify as 'failed' properties due to Tribune's bankruptcy."[26] At the same time, Tribune refers to its post-bankruptcy entity as offering a "fresh-start."[27] After bankruptcy, Tribune's debt load will be reduced and it should be able to continue its profitable operations. In other words, even if voluntary bankruptcy could be considered evidence of failing stations, once the stations come out of bankruptcy, they will no longer be failing and should not require continued cross-ownership.

D. Tribune Does Not Show Independent News Judgment

Tribune fails to show that its co-owned properties exhibit independent news judgment. Tribune points to instances where its properties have criticized each other as proof of their independence.[28] It is certainly not uncommon for co-workers to criticize one another in any field. The occasional difference of opinion does not reflect the extent to which the properties

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[24] 2008 Order, 23 FCC Rcd. at 2048. (quoting Review of The Commission's Regulations Governing Television Broadcasting, Report and Order, 14 FCC Rcd 12903,12938-39 (1999)).
[25] 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 at 14, MB Docket No. 10-104, June 14, 2010 ("Pet. To Deny").
[26] Opp. at iv.
[27] Opp. at 12, 22.
[28] Opp. at 34

independently decide "what stories to air and publish, how to edit those stories, and whether and how prominently to air or display them."[29]

To show independent news judgment, the 2008 Order requires that "commonly owned media outlets must each maintain their own separate news and editorial staff."[30] Tribune's properties simply do not maintain separate staff, a fact which it does not refute. Tribune's consolidated staff is exemplified in Hartford where the same individual, Richard Graziano, is both Vice President/General Manager of the Hartford Broadcast stations and publisher of the Courant. After his dual-role appointment in March 2009, Graziano consolidated multiple operations into a single newsroom, "Connecticut's Newsroom."[31] He appointed a single Director of Content for all the properties and created several other positions overseeing both print and broadcast.[32] Joint decisionmaking began influencing content immediately when the single Director of Content for all platforms appointed a new Courant editor after the two most senior

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[29] 23 FCC Rcd at 2051. A recent incident suggests that the Tribune newspaper and WTIC are not making independent decisions. When a senior reporter at WTIC filed a discrimination suit against the station, it was widely reported elsewhere, but the *Courant* did not mention the story on its website until after the close of business the next day on its site. Moreover, the Courant published WTIC's reaction to the complaint before even reporting on the complaint itself. dubymcd, *TV News Web Site:"Hartford Media Manager's Judgment Called Into Question*," The Laurel, July 9, 2009, http://thelaurelct.com/2009/07/09/hartford-media-managers-judgment-called-into-question/.

[30] 23 FCC Rcd at 2051.

[31] "The Hartford Courant and FOX 61 embark on a quest of excellence by forming 'Connecticut's Newsroom.'" Rich Graziano, Twitter, Dec. 14, 2009, https://twitter.com/richjgraziano/status/6663651822.

[32] A combined vice president of marketing and creative services; an overseer of both the Hartford Courant Operations Department and Television Engineering; a managing director of the Hartford Courant to serve as CFO for print and broadcast, and also oversee New Mass Media publications and the Hartford Courant Circulation Department. Greg Bordonaro, *Carver out; Fox 61 GM to run Courant*, HartfordBusiness.com, Mar. 30, 2009, http://www.hartfordbusiness.com/news8437.html.

editors departed.[33] It is the Director's stated goal to have "everybody working together" across properties, and more specifically, reporters working together whenever possible.[34]

Further evidence of Tribune's combined editorial function in Hartford is reflected in the websites of the Courant and WTIC, a Fox affiliate. Both the Courant the WTIC websites have posted the same articles, attributing authorship to an intertwined news staff of "Fox CT and Courant Staff Reports."[35] Further, WTIC-TV's website tells readers that its local content is "powered by FOX CT and The Hartford Courant."[36] This same problem is also evident in Tribune's Chicago properties, as WGN and Chicago Tribune's websites share identical front page news stories.[37]

III. REQUESTS FOR RELIEF

The assignment of licenses of the Chicago and Hartford broadcast stations is presumptively contrary to the public interest, and Tribune has failed to reverse or rebut this presumption. Thus, the FCC cannot grant the assignments of licenses consistent with the Communication's Act. It does have several other options that would serve the public interest.

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[33] *Can This Man Save the Courant?*, Hartford Advocate, May 19, 2009, http://www.hartfordadvocate.com/featured-news/can-this-man-save-the-courant-2.html.
[34] *See id.*; *Check Out The New "Mr. Content,"* May 17, 2009, New Haven Independent, http://newhavenindependent.org/archives/2009/05/check_out_the_n.php.
[35] *E.g.* Fox CT and Courant Staff Reports, *Sandy Hook Man Drowns In Lake Lillinonah*, July 6, 2010, http://www.ctnow.com/news/connecticut/hc-brookfield-drown-0707-20100706,0,4298878.story; Fox CT and Courant Staff Reports, *Sandy Hook Man Drowns In Lake Lillinonah*, July 6, 2010, http://www.courant.com/community/newtown/hc-brookfield-drown-0707-20100706,0,525420.story.
[36] FAQ: Frequently Asked Questions, What Happened to Fox62.com?, http://www.ctnow.com/about/faq/.
[37] Jon Hilkevitch, *Cross Check*, Chicago Tribune, July 10, 2012, http://www.chicagotribune.com/classified/automotive/commute/ct-met-getting-around-0712-20100711,0,6108313.column; Jon Hilkevitch, *Cross Check*, WGNtv.com, July 10, 2012, http://www.wgntv.com/news/ct-met-getting-around-0712-20100711,0,1256452.column.

A. The Commission Should Grant the Pending Petition for Reconsideration of the Transfer of Control to Zell

Public Interest Petitioners point out that the Martin Commission's earlier grant of the transfer of licensees to Zell was not final because a petition for reconsideration remained pending and the FCC's grant of the petition for reconsideration would result in having to undo the prior transfer.[38] In response, Tribune contends that the petition for reconsideration "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."[39]

This response mischaracterizes the pending petition for reconsideration, which explicitly argued that the "Commission's unprecedented action of conferring an unrequested and unjustified *permanent* waiver of the NBCO in Chicago is arbitrary and capricious and must be reversed."[40] Moreover, the petition asked "the Commission [to] reverse and vacate its November 30, 2007, decision, grant the relief requested here and grant all such other relief as may be just and proper."[41] Thus, contrary to Tribune's claim, the petition for reconsideration clearly asked the FCC to reverse its decision approving the transfer.

In the alternative, Tribune makes the hyper-technical argument that the petition for reconsideration is moot because after filing for bankruptcy, Tribune filed *pro forma* assignment applications approved by the FCC. As a result, Tribune argues that "the transferees that were approved by the 2007 Tribune Order are no longer the licensees."[42] The Commission must reject this argument.

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[38] Pet. to Deny at 19.
[39] Opp. at 8.
[40] UCC, Media Alliance and Charles Benton, Petition for Reconsideration at 13, MB Dkt. 07-119 (Dec. 31, 2007).
[41] Id. at 21.
[42] Opp. at 9.

First, under the FCC rules, a *pro forma* or "short form" 316 application, may only be filed where there is no substantive change in interests.[43] Indeed, in its Form 316 applications, Tribune certifies that

> The instant *pro forma* assignment does not effect a substantial change in the control of the licensees, as the officers and directors of Tribune remain unchanged following the filing of the bankruptcy petition. Through various intermediary companies, control of Tribune remains as it was before the filing of the bankruptcy petition, subject to the jurisdiction and oversight of the bankruptcy court overseeing this voluntary reorganization. Accordingly, the contemplated transfer is *pro forma* in nature.[44]

Thus, although the licenses are held by Tribune Debtor-in-Possession instead of Tribune Co., the same people remain in control and the petition for reconsideration is not moot.

Second, since the 2007 Tribune Order remains nonfinal, it is possible that the FCC or the court could reverse that order. It is especially significant in this regard that Tribune has not moved to dismiss its judicial appeal as moot. Surely, the authority of the FCC to act on reconsideration and the jurisdiction of the Court to act on appeal cannot be eliminated by a company's decision to undergo a *pro forma* transfer. Citizens Petitioners continue to believe that the FCC's 2007 approval of the transfer of control of the Tribune licenses was arbitrary and capricious and should be reversed. If reversed, Tribune would no longer hold the licensees it seeks to transfer. But in any event, the Commission should not compound its prior error by approving the assignments of license to the reorganized Tribune.

B. The Commission Should Deny Tribune's Requests for Both Permanent Waivers and Temporary Waivers

Since Tribune does not meet the test for a presumptive waiver and has failed to rebut the presumption that the transfer is contrary to the public interest with clear and convincing

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[43] 47 CFR §73.3541(f).

[44] *E.g.*, WPIX, Inc., Form 316 Application, BALCT-20081217ACB, Ex. 10, Dec. 24, 2008, https://licensing.fcc.gov/cdbs/CDBS_Attachment/getattachment.jsp?appn=101284085&qnum=5090&copynum=1&exhcnum=1.

evidence, the Commission has no choice but to deny Tribune's request for a permanent waiver of the NBCO rule.[45] The Commission should also reject Tribune's alternative request for a waiver of indeterminate length tied to the pendency of litigation. Such an indeterminate waiver would violate clear Commission policy and amount to a permanent waiver, as litigation is continuous.[46]

Tribune nonetheless argues that its Chicago and Hartford combinations are entitled to an 18 month temporary waiver under a three part test.[47] Tribune appears to have pulled this three-part test out of thin air. It cites no FCC rule or case adopting or applying this test, but only cites its own waiver requests.[48]

The *2008 Order* does not address the criteria for temporary waivers of the revised NBCO rule. Presumably, request for temporary waivers would be few because under the presumptive waiver test, waiver requests would either be granted or denied. At most, a short temporary waiver might be needed to permit orderly divestiture or avoid a "fire sale."[49]

Here, however, Tribune is not seeking temporary waivers to give it time to find buyers. Rather it seeks waivers until 18 months after the FCC's multiple ownership parameters are established with finality. Tribune acknowledges that the 2002 review is still not final even as the

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[45] Tribune's unique concern with being able to quickly transfer its properties in tandem has no basis in law. Tribune cannot suggest that future transfers will not have to comply with ownership rules and the Commission's public interest standards. The request for pre-approval of unspecified future transfer to parties unknown should be denied

[46] *See* Pet. to Deny at 49-52.

[47] Opp. at 56-60.

[48] Opp. at 56, n.174.

[49] *See, e.g., Applications for Transfer of Control of The Liberty Corporation to Raycom Media, Inc.*, 21 FCC Rcd 244 (MB) (Jan. 17, 2006)(granting six month waivers of duopoly rule where buyer was aggressively marketing the stations, had already filed an assignment application for one, and had entered into a consent decree with the DOJ to divest stations); *Chancellor Media/Shamrock Radio Licensees*, 15 FCC Rcd 17053, 17056 (2000); *Multimedia Inc*., 11 FCC Rcd 4883, 4891 (1995); *Stauffer Communications, Inc.*, 10 FCC Rcd 5165, 5165 (1995).

FCC has begun its 2010 review.[50] In practice, then, Tribune's demand for a "temporary" waiver is effectively the same as a permanent waiver and should be denied.

C. At a Minimum, The Commission Should Await the Bankruptcy Court

The Commission should at a minimum hold these license transfer requests in abeyance until the bankruptcy proceeding has concluded. Administrative convenience counsels this, as the transaction Tribune has described in its application may not be the one that is approved.[51] Moreover, emerging from bankruptcy will significantly change the financial situation of the media properties. Awaiting the resolution of the bankruptcy court will allow the Commission to make a determination of the financial condition of the reorganized entities. The Commission will be able to evaluate the amount of and commitment to local news that post-bankruptcy Tribune will deliver. The new board will be identified, and the remaining 70% of shareholders may be disclosed. Thus, the Commission should wait until a full transaction is finalized before it considers these requests.

CONCLUSION

Tribune's Opposition fails to rebut or reverse the presumption that its cross-ownerships are not in the public interest.

WHEREFORE, Public Interest Petitioners ask that the Commission grant the pending petition for reconsideration of the *Tribune-Zell Order* and dismiss or deny the applications for

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[50] Opp. at 57.

[51] *See* Joel Rosenblatt, *Tribune Bankruptcy Examiner Gets More Time for Probe*, Bloomberg, July 2, 2010, http://www.businessweek.com/news/2010-07-02/tribune-bankruptcy-examiner-gets-more-time-for-probe.html; Peg Brickley, *Tribune Chapter 11 Plan Vote Deadline Moved To Aug 6*, The Wall Street Journal, July 1, 2010, http://online.wsj.com/article/BT-CO-20100701-713536.html.

assignment and/or deny the requested waivers. Petitioners also request that the Commission at a minimum await the resolution of the bankruptcy proceedings before considering the applications.

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Certificate of Service

I, Guilherme Roschke, hereby certify that on this 12th day of July 2010, a copy of the foregoing Reply To Opposition To Petition To Deny was served by first-class mail, postage prepaid, upon the following:

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