Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	MB Docket 07-119
Transfer of Control of Tribune	)	
Company from Shareholders of	)	
Tribune Company to Samuel Zell	)	

REPLY TO OPPOSITIONS TO PETITION TO DENY

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SUMMARY

A large proportion of the two oppositions is devoted to feigned umbrage at Petitioners' alleged temerity and to restating the Applicants' basic positions rather than rebutting the *Petition to Deny*. Tribune Company's *Opposition to Petition to Deny* begins with a long essay that adds many words but little substance to the debate. It denies that the relief requested here is unusual, and recounts yet again the history of its efforts to obtain repeal or modification of the newspaper/broadcast cross-ownership ("NBCO") rule.

Upon reading Tribune's account, someone unfamiliar with this history would be surprised to discover that the NBCO rule was upheld by the Supreme Court of the United States as advancing the First Amendment objectives embodied in the public interest standard of the Communications Act. So, too, would one be startled to learn that, far from suffering at the hands of an unresponsive regulatory agency, Tribune has prospered by aggressive self-help and repeatedly stretching the existing ownership rules to and then beyond their outer limits.

Notwithstanding clear FCC policy against indeterminate waivers, and even though it has already benefitted from a special exception to this policy based on "equitable" considerations, Tribune nonetheless demands that the Commission consent to a transfer of control which would permit any existing newspaper publisher or broadcast station operator to acquire and keep a cross-ownership until such time as the FCC completes its ongoing rulemaking.

While Tribune denies that the Commission will establish a precedent leading to many, many similar waivers, Gannett and Media General have already submitted waiver requests very similar to the one which Tribune has sought. And the record also shows that the news of Tribune's waiver request impelled Findlay Publishing Company to inform the Commission that it had previously passed up the opportunity to bid on radio stations coming up for sale in its market, and indicated an interest in obtaining similar waivers in the future.

Transferees Samuel Zell, *et al.*, but not Tribune, present a rather perfunctory standing challenge based on the theory that Petitioners would suffer no injury because the cross-ownership would remain if the applications were denied. This exotic theory might deny standing to challenge almost any transfer, and overlooks the goal of the NBCO rule, under which greater diversity is obtained over time. Denial of the requested waivers will assure that the next sale will result in a break up of the cross-ownership.

Tribune disputes Petitioners' showing that the applications are fatally defective and must be dismissed. However, the authority it cites is inapplicable, and does not rebut Petitioners' point, which is that Tribune's licenses have expired and there is nothing to be transferred.

Neither Tribune nor Zell discuss, much less rebut, the core legal issue presented in the *Petition to Deny*, namely that the proposed waivers cannot be reconciled with the core objective of the NBCO rule, which is to promote ever greater levels of local diversity. In hiding behind the repeated recitation of *dictum* from a 1998 *Notice of Inquiry*, they also avoid discussing, or justifying, the overly broad relief they have sought - an indeterminate waiver which would allow Zell to retain his cross-ownerships for years and years, and presage a repeat of the charade which has allowed Tribune to maintain its cross-ownership in Hartford despite repeated FCC directives to divest.

Instead of attempting to justify their extraordinary waiver request under the governing legal standard articulated in the 1975 *Second Report and Order*, the Applicants claim to fall within the non-existent standard purportedly established in the 1998 *dictum*. They are wrong on the law, and wrong on the facts. The 1998 decision relates to the duration of waivers which would be granted to an otherwise qualified applicant, not whether a waiver should be granted. In any event, the applicants are wrong in claiming that they fit within the 1998 *dictum*, which would apply, at least in theory, where there is a specific proposal to repeal or modify an existing ownership rule. The Commission's 2006 *Further Notice of Proposed Rulemaking* makes no proposal with respect to

repeal or modification, and contemplates retention as well.

The Applicants dispute Petitioners' explanation that the proper geographic area for diversity analysis is the area commonly served by the newspaper/broadcast combination, and not the DMA. However, the actual language of the NBCO rule and FCC decisions clearly support Petitioners' reading. The Applicants seek to distinguish this precedent because it arose in the context of newspaper-radio cross-ownership rather than newspaper-TV cross-ownership, but the same rule, and case law, applies to both.

The Applicants also take issue with Petitioners as to the relevance of media outlets which do not contribute to local viewpoint diversity. Tribune overstates diversity counts by including nationally-oriented cable channels and radio stations with no local news or public affairs programming.

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Petitioners Office of Communication of the United Church of Christ, Inc. (UCC) and Media Alliance by their attorneys, Media Access Project and the Institute of Public Representation, respond herein to oppositions to their June 11, 2007 *Petition to Deny* the above-captioned transaction filed by the Transferor, Tribune Company ("Tribune"), and the Transferees, Samuel Zell, *et al.* ("Zell").

INTRODUCTION

In the *Petition to Deny*, Petitioners showed that the applications for transfer of control of Tribune Company should be dismissed as a matter of law. They also argued, *inter alia*, that the Commission should not depart from current policy by granting the extraordinary relief the Applicants have sought, including waivers of the Newspaper/Broadcast Cross-Ownership Rule ("NBCO Rule") of indeterminate length.

A large proportion of the two oppositions is devoted to feigned umbrage at Petitioners' alleged temerity and to restating the Applicants' basic positions rather than rebutting the *Petition to Deny*. To the extent the Applicants do engage Petitioners' arguments, their responses are addressed below.

Tribune Company's *Opposition to Petition to Deny* ("Tribune Opp.") begins with a long essay that adds many words but little substance to the debate. It denies that the relief requested here is unusual, and recounts yet again the history of its efforts to obtain repeal or modification of the

NBCO. Upon reading Tribune's account, someone unfamiliar with this history would be surprised to discover that the NBCO rule was upheld by the Supreme Court of the United States as advancing the First Amendment objectives embodied in the public interest standard of the Communications Act. So, too, would one be startled to learn that, far from suffering at the hands of an unresponsive regulatory agency, Tribune has prospered by aggressive self-help and repeatedly stretching the existing ownership rules to and then beyond their outer limits.

Notwithstanding clear FCC policy against indeterminate waivers, and even though it has already benefitted from a special exception to this policy based on "equitable" considerations, Tribune nonetheless demands that the Commission consent to a transfer of control which would permit any existing newspaper publisher or broadcast station operator to acquire and keep a cross-ownership until such time as the FCC completes its ongoing rulemaking. While Tribune denies that the Commission will be inundated with similar requests,[1] this claim is belied by the fact that the newspaper industry trade association, the Newspaper Association of America, and Gannett Co., Inc. have filed comments in support of Tribune. As is the case with the Applicants, the arguments they make apply with equal force to any other newspaper publisher seeking to continue and/or expand its newspaper/broadcast holdings. In fact, Gannett has already requested a waiver very similar to the one which Tribune has sought, in connection with its newspaper/TV cross-ownership in Phoenix, AZ. Media General has also made similar requests in several markets.

Lest there be any doubt about the breadth of the precedent sought here, Petitioners respectfully refer the Commission to the Comments filed in this Docket by David P. Glass of Findlay

[1]Tribune says its request is "narrow," and that "[v]ery few existing cross-ownerships will need or be able to make similar requests to prevent divestiture." Tribune Opp. at 17-18.

Publishing Company. Taking note of Tribune's waiver request, Mr. Glass regretfully informs the Commission that "I was not as aggressive with the possible acquisition of the Clear Channel stations in my market because of the likelihood [of obtaining a waiver] was an uphill possibility...at best." Comments of Findlay Publishing Company, Docket 07-119, June 27, 2007. Clearly, he is not alone.

I. PETITIONERS HAVE STANDING TO PARTICIPATE IN THIS MATTER.

Zell, but not Tribune, presents a rather perfunctory challenge to Petitioners' standing to challenge the requested NBCO rule waivers.[2] In its *Opposition to Petition to Deny*, Zell does not seriously dispute that Petitioners would be injured by denial of the requested relief.[3] Its principal claim is that Petitioners' injury can be redressed by Commission action. Zell Opp at 4-5. It says that "[i]f the Commission were to deny the Applications, the existing cross-owned newspaper/broadcast combinations would continue." Zell Opp. at 5. Thus, it argues, "[i]n none of the markets would diversity in any way increase if the Applications were denied." *Id.*[4]

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[2]Zell does not mention the Hartford failing station waiver request, and its argument clearly would not extend to that waiver.

[3]As the D.C. Circuit has held with respect to the duopoly rule, "The ultimate point of the duopoly rule is, after all, to assure (or at least enhance) diversification of viewpoints within the broadcast industry....Listeners are, by definition, 'injured' when licenses are issued in contravention of the policies undergirding the duopoly rule." *Llerandi v. FCC*, 863 F.2d 79, 85 (D.C. Cir. 1988). *See also, Rainbow/PUSH Coalition v. FCC*, 396 F.3d 1235, 1243 (D.C. Cir. 2005) ("a listener, who would be directly affected by the programming diversity the rule was designed to promote, had standing to challenge the Commission's alleged violation of the rule"). Petitioners are similarly injured by contravention of the NBCO rule.

[4]Zell does not distinguish between statutory standing to appear before the Commission and Article III standing sufficient to maintain a judicial challenge to FCC action. This is of little consequence here, since Petitioners fully qualify under the more stringent Article III standard. However, for what it is worth, even if a petitioner failed to establish injury sufficient to satisfy Article III, it can still meet the Commission's lesser test for agency standing. "[A] licensing proceeding before the Commission is not an Article III proceeding to which either the 'case or controversy' or prudential Article III standing requirements apply." *Channel 32 Hispanic Broad-*

Zell's argument is based on an overly cramped view of the interests Petitioners seek to vindicate. Petitioners seek enforcement of the Commission's NBCO, which tolerates maintenance of the *status quo* so long as every sale of a cross-owned broadcast property which does take place results in greater diversity. In this instance, therefore, Petitioners will be vindicated if the transfer is voided, since this will assure that the next sale, whenever it takes place, will result in a break up the impermissible cross-ownership.[5] By contrast, under the sweeping ruling Zell has advocated, no party would ever have standing to challenge a waiver request involving a grandfathered ownership interest.

Zell's standing argument is particularly inapt with respect to New York, Hartford and Los Angeles, where the Commission has never had the opportunity to pass on whether those cross-ownerships are in the public interest; only if the waiver is denied, will Petitioners be able to vindicate their interest in having the Commission pass on the propriety of those Tribune cross-ownerships in the first place. Petitioners are injured even as to Tribune's Chicago cross-ownership, since they are entitled to enforcement of the Commission's 1974 determination that Tribune's properties would be grandfathered only until the first sale of the TV and radio stations. Sale to a new purchaser would, perforce, be subject to the divestiture requirement Petitioners seek to enforce.

Zell also claims that Petitioners are not parties in interest "with respect to most of the Ap-

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casters, Ltd., 15 FCCRcd 22649, 22651 (2000) (*citing Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976)).

[5]Nor is this eventuality a matter of speculation; Tribune is already well along the way in a financial restructuring which will necessitate an immediate sale of the company, if not to Zell, then to other bidders. In the first stage of this complicated transaction, Tribune took on massive debt to finance a stock buyback. It must now sell itself in whole or in pieces to satisfy this debt burden. If the transfer to Zell is denied, another sale will be imminent.

plications they attack...." Zell Opp. at 5. Citing no authority, it argues that Petitioners did not submit declarations from "local declarant[s]" in each of the five affected markets and that "[o]nly with respect to the New York and Miami markets may the FCC even proceed to consider petitioners' allegations." Zell Opp at 6.

The argument lacks weight. First, UCC does have members who are viewers in each of the five cross-owned markets. Second, this is not a series of assignments of individual stations; rather, it is a single transaction in which control of the parent company and, hence, all of its properties, are to be transferred.[6] Standing to challenge the transfer of even one of the affected stations is therefore standing to challenge the entire transaction.

II. THE APPLICATIONS SHOULD BE DISMISSED.

Tribune disputes Petitioners' showing that the applications are facially defective, and must be dismissed. It argues that since Section 307(d) of the Communications Act affords continuing operating authority to licensees during the pendency of their renewal, Tribune may properly transfer its licenses.

Tribune cites two non-existent cases to support its position. The first citation, "*Donovan Burke*, 104 FCC2d 843 (1986)," evidently refers to a case which does not appear in FCC Reports, *Donovan Burke*, 60 RR2d 110 (1986). If so, the authority is wholly distinguishable. In that decision, the Commission stated that it would consider a short-spaced applicant accompanied by a waiver request, but only if it filed a timely reconsideration pertaining to the opponent's qualifications and filed a curative amendment which could be accepted *nunc pro tunc*. This clearly is not the situation here.

[6]See Tribune Opp. at 1-2 (explaining restructuring plan).

The second citation is to "*Metromedia Radio & Television, Inc*., 102 FCC2d 1196 (1985)." This is probably intended to refer to *Metromedia Radio & Television, Inc*., 102 FCC2d 1334 (1985). That case did not involve an application accompanied by a request for waiver. Rather, assignor's licensed status and qualifications were not in doubt, but there was a problem with the qualifications of the applicant to be a licensee. The assignee represented that the defect - its controlling owner was not a citizen - would be cured prior to the Commission's action. The case does not stand for the proposition that a defective application will be accepted when accompanied by a waiver application. *See Nevada Broadcasting Group*, 1986 WL 291868 (1986) (MMB) (distinguishing *Metromedia*).

Not surprisingly, then, this is a case of first impression. That is because until now no licensee has ever had the temerity to acquire newspapers during the term of a license and thereafter failed to come into compliance with the NBCO rule by the time of license expiration, much less them sought to transfer the license. However, it should be clear that Section 307(d) does not confer with it the transferability associated with a renewed and unencumbered license. Thus, Tribune's citation to *Committee for Open Media v. FCC*, 543 F.2d 861 (D.C. Cir. 1976) is unavailing. In fact, what that case holds is that a licensee operating under authority of Section 307(d) does not have to file a renewal application because there is nothing to be renewed. *See id.*, 543 F.2d at 866-868. If anything, then, it would suggest similarly that there is nothing to be transferred either.[7]

[7]Zell and Tribune point out that a case cited by Petitioners, *Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964), involved a licensee found to lack character qualifications. They observe, quite correctly, that neither the transferor's nor the transferee's character is at issue here. That, however, misses the point of the citation. The question here is whether there is an authorization to be transferred, not the reason why there is no such authorization.

III. THE APPLICANTS ARE NOT ENTITLED TO A WAIVER OF INDEFINITE LENGTH.

Neither Tribune nor Zell discuss, much less rebut, the core legal issue presented in the *Petition to Deny*, namely that the proposed waivers cannot be reconciled with the core objective of the NBCO rule, which is to promote ever greater levels of local diversity. *Petition to Deny* at 21-23. In hiding behind the repeated recitation of *dictum* from the Commission's 1998 *Notice of Inquiry*, *1998 Biennial Review*, 13 FCCRcd 11276, 11294-95 (1998) ("1998 NOI"), hey also avoid discussing, or justifying, the overly broad relief they have sought - an indeterminate waiver which would allow Zell to retain his cross-ownerships for years and years, and presage a repeat of the charade which has allowed Tribune to maintain its cross-ownership in Hartford despite repeated FCC directives to divest.

Instead of attempting to justify their extraordinary waiver request under the governing legal standard articulated in the 1975 *Second Report and Order*, the Applicants claim to fall within the non-existent standard purportedly established in the 1998 *dictum*. They are wrong on the law, and wrong on the facts.

As Petitioners discussed at length in the *Petition to Deny* at 4-6, 16-23, the Commission's waiver policy for the NBCO rule is set out in the Commission's 1975 *Second Report and Order* and the numerous cases implementing that policy. Tribune devotes a footnote to dismissing this demonstration, chastising Petitioners for claiming that the Applicants have not met the standard for a waiver under the so-called fourth, "catch all" provisions of the 1975 *Second Report and Order*. Tribune instead argues that "to the extent the Petitioners seek to employ the" 1975 waiver policy, "it must reflect the standard articulated in the [1998] *Notice of Inquiry*." Tribune Opp. at . 12, footnote

29. This is mere evasion, as Tribune has never even claimed that it qualified under any of the other three criteria established in 1975, and it quite clearly cannot justify relief based on any of them.[8]

Thus, the only basis upon which Tribune could qualify for a waiver would be under the fourth "catch-all" provision which, as Petitioners have shown, *Petition to Deny* at 21-23, requires proof that the waiver would advance the Commission's diversification objectives.[9] Clearly, the applicants cannot do this, and they do not even try.

Rather than attempt to come under existing law, the Applicants again place complete reliance on *dictum* in the 1998 NOI in which the Commission reiterated its longstanding policy ***against*** indeterminate waivers. 1998 NOI, 13 FCCRcd at 11294-95 (1998). In that decision, the Commission explained why it was reiterating its unwillingness to grant indeterminate waivers by discussing the circumstances that pertained as of that time. It then noted that under *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), an applicant can always request a waiver, and observed that as of that

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[8]Specifically, Tribune does not, and could not possibly, claim that it has been unable to sell its stations (the first criterion), that the only possible sale would be at a depressed price (the second criterion), or that it is impossible to operate the newspaper and broadcast properties independently (the third criterion). *Second Report and Order*, 50 FCC2d 1046, 1085 (1975). Having just conducted a vigorous auction with multiple bidders, at least some of whom contemplated operating the properties separately, it is clear that Tribune is highly marketable, at a market price, to buyers ready to break up the newspaper and broadcast properties.

[9]The Applicants argue that the so-called "*Avco* Amendment" to Section 310(d) precludes consideration of the fact that some of the potential purchasers of Tribune contemplated spinning off Tribune's broadcast properties. Zell Opp. at 9-10, Tribune Opp. at 9. This argument is wholly misplaced. Petitioners are not asking for a comparative hearing (as was the case in *Avco*); rather, their introduction of the facts of the Tribune auction is precisely what the Commission takes into account in considering whether to waive the NBCO rule. Petitioners do not ask that Tribune be required to sell to any particular party; it is Tribune which has voluntarily chosen to sell itself. What Petitioners have demonstrated is simply that Tribune has not met any of the criteria which could justify waiving the NBCO.

time, "for example...[no]...protracted proceeding or substantial record exist[ed] on any of these [rulemakings] that leads us to initial conclusions about any specific proposals to modify or eliminate any of the rules at issue here." 13 FCC2d at 11294. The Commission did not establish a policy as to whether or when it might actually grant such indeterminate waivers, and it at no time discussed the standard under which an applicant might initially qualify for a waiver.

The most important flaw, then, in the Applicants' argument is that the 1998 NOI does not establish a basis to change pre-existing policy for ***obtaining*** a waiver. The 1998 NOI was not addressed to whether and how a waiver should be granted, but rather goes only to the ***duration*** of a waiver that an applicant was otherwise justified to receive. Even assuming that the 1998 NOI were governing policy establishing an entitlement to a waiver, Tribune and Zell are wrong in claiming they fall within it. In particular, in the current review of the Commission's NBCO rule, the Commission has left open the question of whether the rule should be repealed or modified, and it has made no specific proposal on what, if any, modifications it might make to the NBCO rule. In particular, notwithstanding what Applicants say, there is no basis for believing that the current membership of the Commission is at this time disposed to repeal the NBCO or, at the least, modify it in a manner which would permit Zell to maintain newspaper/broadcast cross-ownerships in all five affected markets. Simply put, it is not inevitable that the Commission will take action which would permit Tribune to maintain its five newspaper/broadcast cross-ownerships.[10]

The easiest way to see how the applicants have misread the Commission's current position is to quote in its entirety the Commission's statement requesting further comment on the NBCO rule

[10]As Petitioners pointed out in their *Petition to Deny* at 19-20, the fact that the Court of Appeals did not reject the reasoning of a prior Commission concerning the NBCO rule based on the record then available does not bind the current Commission to repeal or even modify the NBCO.

in its July, 2006 *Further Notice of Proposed Rulemaking*:

> 32. We invite comment on all of the issues remanded by the *Prometheus* court regarding cross-ownership. Many of these issues relate to the DI. In light of the court's extensive and detailed criticism of the DI***, we tentatively conclude that the DI is an inaccurate tool for measuring diversity.*** Moreover, we recognize that some aspects of diversity may be difficult to quantify. To the extent that we will not use the DI to justify changes to the existing cross-ownership rules, we seek comment on how we should approach cross-ownership limits. Should limits vary depending upon the characteristics of local markets? If so, what characteristics should be considered, and how should they be factored into any limits? We seek comment on the newspaper/broadcast cross-ownership rule and the radio/ television cross-ownership rule. Are there aspects of television and radio broadcast operations that make cross-ownership with a newspaper different for each of these media? If so, should limits on newspaper/radio combinations be different from limits on newspaper/television combinations? ***Lastly, are the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule necessary in the public interest as a result of competition?***

2006 Quadrennial Regulatory Review, 21 FCCRcd 8834, 8848 (2006) (emphases added).

Two points stand out. First, the only matter as to which the Commission has made ***any*** tentative conclusion is that it will not retain the "DI."[11] Thus, the Commission signaled that it would ***abandon*** a measure which, as it happens, would have given the Applicants the relief they now seek. Second, while the Commission previously concluded that it would modify the current rule, it makes ***no proposal*** whatsoever, much less any tentative conclusion, as to whether it will retain or modify the current rule during the current proceeding. Instead, it has reopened the central statutory question posed under Section 202(h) of the 1996 Telecommunications Act, asking not how the existing rule should be modified, but rather whether the current rule is "necessary in the public interest as a result of competition." *2006 Quadrennial Regulatory Review*, 21 FCCRcd at 8848.

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[11]This is an acronymic reference to the so-called "diversity index" adopted by the Commission in its *2003 Biennial Review Order*, 18 FCCRcd 13620 (2003), but rejected by the Third Circuit. *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 408-09, 412 (3d Cir. 2004).

Going back to the language of the 1998 NOI, no one would dispute that there is a "protracted proceeding" under way. However, what the Commission said was that an indeterminate waiver ***might*** be appropriate where such a "protracted proceeding" had led the Commission to "initial conclusions about any specific proposals to repeal or modify any...rules...." 1998 NOI, 13 FCCRcd at 11294. Other than rejecting the DI, which would have helped Tribune, there is no such conclusion, initial or otherwise, and there most certainly is no "specific proposal" on the table.

IV. THE RELEVANT GEOGRAPHIC AREA FOR ANALYSIS IS THE AREA COMMONLY SERVED BY THE NEWSPAPER/BROADCAST COMBINATION, NOT THE DMA.

Tribune and Zell suggest that Petitioners' interpretation of the relevant geographic market is "novel" and unsupported by any FCC rule, policy or decision," Tribune Opp. at 35, even suggesting that it might be "flat-out silly." *Id.* at 36. *See also*, Zell Opp. at 11-12. However, each fails to provide adequate support for its own position, that the relevant geographic market is the entire DMA. In actuality, while Petitioners' position is supported by the language of the rule itself and past FCC decisions, it is the Applicants' definition of the relevant geographic market that seems to be the novel one.

The NBCO rule itself establishes that the relevant market for determining whether the cross-ownership is prohibited is the area where the signal contour of the broadcast station encompasses the area in which the newspaper is published. 47 CFR §73.3555(d). Thus, when contemplating waiver requests, the Commission must analyze whether the community-owned media outlets provide a sufficient level of viewpoint diversity to those they are intended to serve. According to *Hopkins Hall Broadcasting*, 10 FCCRcd 9764 (1995), and *Columbia Montour Broadcasting*, 13 FCCRcd 13007 (1998), in making this determination, the Commission must determine whether sufficient viewpoint

diversity exists in the "area of overlap" between the broadcast station and the newspaper.

Tribune and Zell nonetheless question Petitioners' reliance on the rule itself and readings of both *Hopkins Hall Broadcasting* and *Columbia Montour Broadcasting*. *See* Tribune Opp. at 35-40; Zell Opp. at 10-13. They attempt to downplay the relevance of those decisions by attempting to make the distinction that those decisions dealt with newspaper-radio combinations, not newspaper-television combinations. *See* Tribune Opp. at 35-38; Zell Opp. at 11. However, neither offers any explanation as to why the newspaper-radio combination should be treated differently from the newspaper-television combination; both are governed by the *same* rule, which is intended to serve the same public interest purpose - the promotion of viewpoint diversity. Moreover, the principle drawn from those cases and used by analogy here remains - the overlap between the areas served by the potentially cross-owned media outlets defines the relevant geographic area.

Even so, the Applicants attempt to argue otherwise. They make an illogical leap in relying on portions of a quotation from *Hopkins Hall*. In *Hopkins Hall Broadcasting*, Shelbyville Publishing requested a permanent waiver of the daily newspaper cross-ownership rule so that it could acquire a radio station, while retaining ownership of its local daily newspaper. *Hopkins Hall Broadcasting*, 10 FCCRcd at 9764. Shelbyville Publishing contended that a competition and diversity analysis should include impact of the proposed waiver on the entire Nashville ADI.[12] *Id.* at 9766. The quoted text in Applicants' Oppositions merely indicated that the Nashville ADI related to television stations and therefore did not represent the relevant market for the newspaper/radio combination in question. *Hopkins Hall Broadcasting*, 10 FCCRcd at 9766.

However, Tribune claims that this distinction indicated that the DMA was the relevant market

[12]ADI stands for "area of dominant influence," and is a measure similar to the DMA.

for television stations, though the Commission clearly said no such thing explicitly. Tribune Opp. at 37. Zell similarly implies that the ADI would have been the appropriate standard in a newspaper-television case. *See* Zell Opp. at 11. Taken in context, it is clear that the Commission was actually just pointing out an obvious error made in Shelbyville Publishing's argument, explaining that the area proposed as the "relevant market" did not even relate to the entities in question. *Hopkins Hall Broadcasting*, 10 FCCRcd at 9766.

In *Columbia Montour Broadcasting*, although the Commission did include all television stations from the local DMA in its analysis, the Applicants' attempt to suggest that the Commission established the DMA as the relevant market is a stretch. By including all television stations from the local DMA, the Commission merely noted that all of the television stations extended a Grade A signal over the common area served by the newspaper and radio station in question - the relevant geographic market. *Columbia Montour Broadcasting*, 13 FCCRcd at 13015. This analysis hardly establishes that the DMA is the relevant market for a television station, since the appropriateness of considering the television stations was based on their contour coverage of the relevant geographic market, not based on the fact that they happened to fall in the same DMA as that market. Indeed, the referenced material only reinforces the Petitioners' position by again identifying the relevant geographic market as the common area served by the proposed media combination and also by highlighting the importance of the Grade A signal of television stations as a viable measure of their coverage.

Just as the relevant geographic market was the common area served by a newspaper-radio combination in *Columbia Montour Broadcasting* and *Hopkins Hall Broadcasting*, by analogy, the relevant geographic market in the case of a newspaper-television combination is the common area served by them. To claim that the relevant geographic market in such a case is the entire local DMA

is to neglect the FCC precedent of examining the area of overlap in analogous newspaper/radio cross-ownership cases. *See, e.g., Hopkins Hall Broadcasting*, 10 FCCRcd at 9764; *Columbia Montour Broadcasting*, 13 FCCRcd at 13007. That argument, by analogy, would lead to analyzing either the entire 2 mV/m contour or the entire area of newspaper circulation in a newspaper/radio cross-ownership case. FCC precedent has not provided a basis for such a position.[13]

Zell also attempts to ignore precedent and tries to justify the use of the DMA in determining the overlap area by reasoning that since the DMA is used in the duopoly rule to determine the geographic market area, the DMA should also be used to determine the relevant geographic area for the NBCO rule. Zell Opposition at 12-13. Zell fails to realize that TV duopolies are governed by a *different* rule than the NBCO rule. *Compare* 47 CFR §73.3555(d) with 47 CFR §73.3555(b).

The TV duopoly rule uses the DMA to determine which television stations are available to communities because a station's viewership is not "necessarily coextensive with the area of its broadcast signal coverage" because many stations are carried by cable and satellite. *Review of the Commission's Regulation Governing Television Broadcasting*, 14 FCCRcd 12903, 12926 (1999). However, newspapers are not redistributed over the entire DMA by cable or satellite. Consequently,

[13]Zell claims that the FCC has "relied on" the DMA as the appropriate geographic market in newspaper/television cross-ownership cases, citing three cases, in which dominant additional factors precluded significant reliance on diversity considerations in the geographic market indicated. Zell Opp. at 11, footnote 28. "The FCC has incidentally mentioned the DMA" would have been a more accurate statement than "relied on," in terms of the cited cases. *See Counterpoint Communications, Inc.*, 20 FCCRcd 8582, 8588-89 (2005) (granting a waiver "based only on the unique circumstances" of a city's only licensed station failing and unable to be sold, with little mention of the local newspaper.); *UTV of San Francisco*, 16 FCCRcd 14975, 14988-89 (2001) (denying explicitly a request for the same kind of interim waiver sought by Zell/Tribune and granting a temporary waiver, emphasizing the financial instability of the newspaper in question); *Metromedia Radio & TV*, 102 FCC2d at 1349-50 (mentioning undefined "surrounding areas" without indication that they exceeded the circulation area of the newspaper in question, thus providing no precedent for appropriate geographic market).

and obviously, the rationale of using the DMA in duopolies can not apply to the NBCO.

V. MEDIA OUTLETS THAT DO NOT PROVIDE COVERAGE OF LOCAL ISSUES DO NOT CONTRIBUTE TO VIEWPOINT DIVERSITY.

Tribune and Zell allege that Petitioners make "an effort to avoid" or "refuse...to recognize marketplace realities" in order to rely on "imaginary geographic markets" which are the product of an "illogical and unrealistically narrow" definition. Tribune Opp. at 35, 39; Zell Opp. at 10. But in reality, it is Tribune and Zell that seek to have the Commission ignore the realities of the market. The purpose of the newspaper/broadcast cross ownership rule is to promote diversity in the media. *See, e.g.*, *Columbia Montour Broadcasting*, 13 FCCRcd at 13012; *Hopkins Hall Broadcasting*, 10 FCCRcd at 9765; *1998 Biennial Review*, 15 FCCRcd 11058, 11061-62 (2000). In particular, the Commission has stressed the importance of independent local news and programming addressing local concerns in its attempts to promote diversity,[14] as recognized by the courts.[15] Consequently, in its diversity analysis, the Commission should primarily consider only those media outlets that provide local news.

Tribune overstates the diversity in all of the markets at issue by including outlets which do

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[14]The Commission has previously recognized that:

> News and public affairs programming is the clearest example of programming that can provide viewpoint diversity. [W]e regard viewpoint diversity to be at the core of our public interest responsibility, and recognize that it is a product that can be delivered by multiple media....Because what ultimately matters here is the range of choices available to the public, we believe that the appropriate geographic market for viewpoint diversity is local, *i.e.*, people generally have access to only media available in their home market.

2003 Report and Order, 18 FCCRcd at 13776-13777 (2003) (footnotes omitted).

[15]The Third Circuit noted that the "Commission properly excluded cable because of serious doubts as to the extent that cable provided independent local news -- the Commission's recognized indicator of viewpoint diversity in local markets." *Prometheus Radio Project v. FCC*, 373 F.3d at 405 (citing *2003 Report and Order*, 18 FCCRcd at 13776-13777).

not provide any local news. Tribune ignores the great importance the Commission has placed on local news in diversity analysis, claiming that the content of media outlets' transmissions should not be considered at all and relying simply on the number of different voices. Tribune Opp. at 41-43. Nonetheless, Tribune still includes them as sources of local viewpoint diversity. Similarly, radio stations that primarily broadcast music or sports and do not air local news contribute little to viewpoint diversity. Internet websites that merely republish what has been reported by the main-stream media can also not be considered a significant source of locally-oriented programming. Likewise, nationally-oriented cable channels offer little if anything in the way of local news and public affairs.

Contrary to Tribune's assertion that Petitioners ignore cable channels as available voices in the market solely because they are owned by major media companies, Petitioners are simply applying precedent set by the Commission and affirmed by the Third Circuit. *Prometheus Radio Project v. FCC*, 373 F.3d at 405 As Tribune is well aware, the *Prometheus* Court found that the "Commission properly excluded cable because of serious doubts as to the extent that cable provided independent local news -- the Commission's recognized indicator of viewpoint diversity in local markets." *Id*. More importantly, Tribune has not cited any evidence that cable news channels, such as CNN, provide any independent local news. Thus, both common sense and precedent require that the Commission only focus on media outlets that provide local news when assessing the impact of cross-ownership on diversity.

Finally, Tribune's claim that cross-ownership cannot harm competition, because television advertising and newspaper advertising constitute separate markets, is irrelevant. As Petitioners have established in the *Petition to Deny* and reaffirmed above, the issue of concern -- and thus, the relevant

measure for the purpose of the NBCO rule -- is the availability of independent voices providing local news. While advertising competition is beneficial, it is not a relevant metric for calculating whether cross-ownership would diminish the diversity of viewpoints from antagonistic sources available to local communities. The fact that Tribune's television and newspaper properties do not compete for advertising revenues because they are in separate advertising markets does not in any way make them more antagonistic or more independent sources of viewpoint diversity.

VI. THE APPLICANTS ARE NOT ENTITLED TO A FAILING STATION WAIVER.

Little need be said about the failing station waiver requested for Hartford, because the Applicants say precious little to oppose Petitioners' showing that there are alternative bidders for Tribune's properties. *See* Tribune Opp. at 59-60.

VII. ANY WAIVER GRANTED IN THIS CASE SHOULD BE CONDITIONED ON ESTABLISHMENT OF A DIVESTITURE TRUST.

Tribune offers nothing but rhetoric in opposition to Petitioners' request that, if any waiver is granted, the Commission require establishment of a divestiture trust. Tribune Opp. at 60-61. Despite Tribune's feigned outrage, the fact is that this is a common procedure which is entirely appropriate under the circumstances, *i.e.*, where Tribune has failed to divest its Hartford TV duopoly or its newspaper/broadcast cross-ownerships.

In a transparent effort to create a jurisdictional basis for appeal, *but see Tribune v. FCC*, 133 F.3d 61, 60 (dismissing appeal for want of jurisdiction), Tribune closes its argument with a claim that imposition of a divestiture trust "would be the same as a denial of the applications." This is entirely illogical; the only difference between a waiver with a trust and one without a trust is that the former is more likely to be enforced.

CONCLUSION

For the foregoing reasons, UCC and Media Alliance request that the Commission dismiss the applications for transfer of control or deny them for the reasons set forth above. In the event the Commission were to grant waivers of any kind, they should be conditioned upon the establishment of an irrevocable divestiture trust. The Commission should also grant all such other relief as may be just and proper.

Respectfully submitted,

/s/

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/s/

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I, Andrew Jay Schwartzman, hereby certify that on this 6th day of July, 2007, a copy of the foregoing *Reply to Oppositions to Petition to Deny* was served by first-class mail, postage prepaid, upon the following:

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