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JOINT STATEMENT BY FCC COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN ON RELEASE OF MEDIA OWNERSHIP ORDER

After being told we have to "hurry up" and vote by December 18, the Commission waited over a month and a half before finally issuing this Order. Apparently, it took the majority that long to finalize issues left unresolved at the time we voted. There is no reason we could not have heeded the wishes of many in Congress to take the time needed to work these kinks out before the Commission voted.

From the day Chairman Martin's newspaper-broadcast cross-ownership proposal was announced last November, we pointed out that it was so vague and chock-full of loopholes that it would permit any broadcast station to merge with any newspaper in virtually any market in the country. The Order being released today does little to close those loopholes—indeed, it creates two new ones.[1]

Not to worry, the majority reassures us in paragraph 68 of the Order, because any combinations that don't qualify for a positive presumption will face a "high hurdle." We remain skeptical. Anyone looking to gauge how high this hurdle is likely to be need only flip to paragraph 77, where the majority casually grants ***five*** permanent waivers to newspaper-broadcast combinations that would ***not*** qualify for the public interest presumption involving top-20 markets and non-top-four TV stations under the new rule.

The alacrity with which the majority grants these permanent waivers is breathtaking. Our offices first learned that the majority was even considering such waivers on December 17 at 9:44 p.m.—the night before the agenda meeting—when we received a draft containing the new language. Up until then, the Order contemplated that these newspaper-broadcast combinations would have to be justified under the new rules. The very next morning, the majority adopted the new *Order* and these five permanent waivers were summarily approved.

The most telling—and troubling—aspect of the majority's analysis is the absence of any discussion of the "twin principles" of diversity and competition underlying the cross-ownership

[1] Specifically, an applicant can reverse a negative presumption if the broadcast station or newspaper in the proposed combination qualifies as "failed" or "failing," or if the applicant proposes to initiate local newscasts on a broadcast station that previously did not offer local news.

ban.[2] The Order notes that there have been three permanent waivers of the cross-ownership ban.[3] In two of the cases, the Commission focused on the potential impact of the proposed combination on diversity and competition in the affected markets.[4] The third permanent waiver (to Tribune in Chicago) was granted late last year by this same majority and suffers many of the same analytical shortcomings as the current Order.

Nor do the specific factors relied on by the majority inspire much confidence in its commitment to setting a high hurdle.[5] The first two factors—the advent of "synergies" and "new services"—are inherently squishy terms that just about any combination could allege and, as noted above, say nothing about the effect on diversity and competition in the local market. Indeed, this sort of test gives the green light to companies to fire reporters and other employees to achieve "synergies."

The third factor—avoiding the "harms associated with mandatory divestitures"—is a dangerous precedent, especially where, as here, the applicants consummated the transaction with full knowledge of the FCC's rules. Indeed, only last November, the majority refused to grant permanent waivers to the Tribune cross-owned properties in markets other than Chicago for precisely that reason.[6]

Nor does the fourth factor—the "prolonged period of uncertainty" surrounding the newspaper/broadcast cross-ownership ban—hold up under scrutiny. In May 2000, the Commission completed it first biennial review of the newspaper-broadcast cross-ownership ban and reaffirmed that it continued to serve the public interest.[7] Four of the newspapers at issue were acquired ***that same year*** (the remaining paper was acquired two years earlier, in 1998).[8]

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[2] *See 1975 Second Report and Order*, 50 FCC 2d 1046, 1074 (1975).

[3] *See* n.247.

[4] *See In the Matter of Fox Television Stations, Inc.,* 8 FCC Rcd 5341 (1993) (granting a permanent waiver for WNYW-TV and the *New York Post* after lengthy assessment of potential impact on competition and diversity in New York City, including dire financial condition of the *Post* that threatened the loss of a media voice in the market); *In the Matter of Kortes Communications, Inc and Stafford Broadcasting*, 15 FCC Rcd 11058 (2000) (granting permanent cross-ownership waiver in Greenville, Michigan based, among other things, on findings that radio station would likely be taken off the air and had no measurable audience share).

[5] In the Order being released today, the majority finds that the public interest supports permanent waivers in these five markets based on: (1) the "synergies" that have already been achieved by the newspaper/broadcast station combination; (2) the new services provided to local communities by the combination; (3) the harms associated with mandatory divestitures; (4) the "prolonged period of uncertainty" surrounding the status of the newspaper/broadcast cross-ownership ban; and (5) the length of time that the waiver request has been pending.

[6] *See In the Matter of Shareholders of Tribune Company,* FCC 07-211 (rel. Nov. 30, 2007) ("[U]nlike Chicago, Tribune knew at the time it created the combinations in the other markets that they did not comply with the Commission's rules and that divestiture ultimately was required unless those rules changed.") The only precedent cited by the majority is the Order adopting the original cross-ownership ban in 1975. There, the FCC declined to require divestitures for combinations that were formed prior to adoption of the ban. That is not the situation here.

[7] 15 FCC Rcd 11058 (2000).

[8] Gannett purchased *The Arizona Republic* in Phoenix, Arizona in August 2000. Media General purchased the *Herald Courier* in Bristol, Virginia/Tennessee in January 1998, the *Morning News* in Florence, South Carolina in August 2000, the *Opelika-Auburn News* in Opelika, Alabama in 2000, and the *Jackson County Floridian* in Marianna, Florida in September 2000.

Thus, when the papers were purchased, the ban had just been expressly retained. Subsequent rulemakings and court actions arising out of the biennial (now quadrennial) reviews mandated by Congress should not give parties the right to equitable relief based on claims of "uncertainty."

Finally, the fifth factor—the "length of time that the waivers have been pending"—does not compel the granting of a permanent waiver. The majority does not note that the Gannett waiver request was filed in June 2006 or that most of the requests are opposed.[9] In any event, the timing of Commission action on these cases was within the Chairman's exclusive control. Yet, until now, they have never been presented to the full Commission for consideration. It is not reasonable for the Chairman to withhold action on certain waiver requests and then argue that, because of the passage of time, they should be granted.

Technically, these permanent waivers will not be precedent under the new rules because they (allegedly) are being decided under the existing waiver standard. But they are revealing. And what they reveal does not bode well for those of us concerned about how strictly the new rules are likely to be applied. We said the new rules were likely to be about as tough as a bowl of Jell-O. What we didn't realize was that they may turn out to be as tough as a bowl of Jell-O ***before*** it's put in the fridge.

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[9] Gannett requested its waiver in Phoenix in June 2006. Media General requested its waivers in August 2004 (South Carolina combination, Petition to Deny filed by Common Cause of South Carolina), October 2004 (Florida combination, Petition to Deny filed by NAACP and Free Press), December 2004 (Alabama combination, Petition to Deny filed by Free Press, Institute for Public Representation and Media Access Project), and April 2005 (Virginia/Tennessee combination, Informal Objection file by Free Press).