

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of
COUNTERPOINT COMMUNICATIONS, INC.
(Transferor)
and
TRIBUNE TELEVISION COMPANY
(Transferee)
Request for Extension of Waiver of Section
73.3555(d) of the Commission's Rules for Station
WTXX(TV), Waterbury, CT
File No. BTCCT-19991116AJW
Facility ID No. 14050

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 2005

Released: April 13, 2005

By the Commission: Commissioners Copps and Adelstein concurring and issuing a joint statement.

I. BACKGROUND

1. In November 1999, Tribune Television Company ("Tribune"), the licensee of Station WTIC-TV-TV, Hartford, CT, filed an application to acquire the assets of Counterpoint Communications, Inc., including television station WTXX, Waterbury, CT. Tribune sought two waivers in connection with this application. First, Tribune requested a "failing station" waiver of the local television ownership rule to permit its common ownership of two television broadcast stations in the same market, WTIC-TV-TV and WTXX. Second, Tribune sought a waiver of the newspaper-broadcast cross-ownership rule to allow it to commonly own the Hartford Courant, a newspaper acquired during the pendency of its application, and Station WTXX.

1 Both stations are assigned by Nielsen to the same Designated Market Area ("DMA"), Hartford-New Haven, CT (DMA # 27). The local TV ownership rule permits common ownership of two television stations in the same DMA only if: (a) the stations did not have overlapping Grade B contours; or (b) if at least one of the stations was not ranked among the top four in terms of audience share, and eight independent television voices would remain in the market post-merger. 47 C.F.R. §73.3555(b). Although WTXX was not ranked among the top four stations in the market, the combination did not comply with the eight-voice standard.

2 Section 73.3555(d)(3) of the Commission's Rules provides that "no license for [a] . . . TV broadcast station shall be granted to any party . . . if such party directly or indirectly owns, operates, or controls a daily newspaper and the grant of such license will result in" the Grade A signal contour of that television station encompassing the entire community in which such newspaper is published. Tribune acquired the Hartford Courant as part of its acquisition of Times-Mirror, a multi-market newspaper publisher. The Grade A contour of Station WTXX encompasses the community of publication of the Hartford Courant and the combination would not, therefore, have complied with the newspaper-broadcast cross-ownership rule. 47 C.F.R. §73.3555(d). Because Tribune acquired The Hartford

(continued...)

2. The Commission found that WTXX was at risk of failure absent common ownership with WTIC-TV and therefore granted a permanent local television ownership waiver under the “failing station” standard.³ It also granted a temporary waiver of the newspaper-broadcast cross-ownership rule for common ownership of WTXX and the *Courant* for a period of six months from consummation of the transaction.⁴ Tribune was granted a six-month extension of this waiver on February 19, 2002.⁵ As a condition of the extension, the Commission required that Tribune use its best efforts to divest WTXX and that Tribune file status reports every 45 days that detail its efforts to sell the station.⁶

3. Prior to the end of the waiver extension, on August 6, 2002, Tribune sought a further extension of time to comply with the newspaper-broadcast cross-ownership rule (the “*Further Extension Request*”). Specifically, Tribune sought a permanent waiver or, in the alternative, a temporary waiver for one of two time periods: (a) through filing of the WTIC-TV renewal application in December 2006; or (b) pending the outcome of the Commission’s review of the newspaper-broadcast cross-ownership rule.⁷ On March 21, 2005, a federal court found Tribune in violation of a Commission order for failing to comply with the divestiture deadline specified in the *Counterpoint Extension*, and ordered Tribune to divest Station WTXX(TV).⁸ Although the court ordered Tribune to divest forthwith based on its understanding of the facts at the time, it did not purport to withdraw the Commission’s ability to act on the *Further Extension Request*.⁹

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Courant after WTIC-TV, it is permitted to own both the newspaper and television station until the end of WTIC-TV’s current license term in 2007. See *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*, 50 F.C.C.2d 1046, 1076 n.25 (1975), *aff’d sub nom. FCC v. National Citizen’s Committee for Broadcasting*, 436 U.S. 775 (1978) (intermediary citations omitted) (“*Newspaper-Broadcast Order*”).

³ See *Counterpoint Communications*, 16 FCC Rcd 15044 (2001) (“*Counterpoint*”). The failing station waiver criteria are as follows: (a) one of the merging stations has had a low all-day audience share (*i.e.*, 4 percent or lower; (b) the financial condition of one of the merging stations is poor (*i.e.*, “A waiver is more likely to be granted where one . . . of the stations has had a negative cash flow for the previous three years;” (c) the merger will produce public interest benefits (*i.e.*, “A waiver will be granted where the applicant demonstrates that the tangible and verifiable public interest benefits of the merger outweigh any harm to competition and diversity.”). See *Review of the Commission’s Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12939 (1999) (“*1999 Local TV Order*”), *recon. granted in part*, 16 FCC Rcd 1067 (2001) (“*Local TV Reconsideration*”). In most circumstances, parties also must show that the in-market buyer is the only willing and reasonably available purchaser. This showing is not required of a waiver applicant that seeks to acquire a station with which it formed a local marketing agreement (“LMA”) prior to the adoption of the *1999 Local TV Order*, as was the case with Tribune and WTXX. See *Local TV Reconsideration*, 16 FCC Rcd at 1077.

⁴ *Counterpoint*, 16 FCC Rcd 15044 (2001).

⁵ See *Counterpoint Communications*, 17 FCC Rcd 3243 (2002) (“*Counterpoint Extension*”).

⁶ *Id.*

⁷ See *Application of Counterpoint Communications and Tribune Television Co.*, File No. BTCCT-19991116AJW, Facility ID No. 14050, Request for Waiver (filed Aug. 2, 2002) (“*Further Extension Request*”). During the pendency of this waiver request, the Media Bureau sent a letter to counsel for Tribune which stated that Tribune was “in full compliance with the Commission’s multiple ownership rules and the Waiver with respect to Tribune’s ownership of the *Hartford Courant*” and the Stations. See *Letter from W. Kenneth Ferree, Chief, Media Bureau, to Tribune Television Co. c/o R. Clark Wadlow, Esq.* (Sept. 5, 2003). We have not identified any other instances in which such a letter was issued.

⁸ See *Ellis v. Tribune TV Co.*, Civil Action No. 3:03 CV833 (CFD), Ruling on Motion to Dismiss and Motion for Summary Judgment (D. Conn., Mar. 21, 2005).

⁹ *Id.*

4. As discussed more fully below, common ownership of WTIC-TV and WTXX appears to have produced public interest benefits, and Tribune has attempted, albeit unsuccessfully, to sell both stations together, as well as WTXX individually. These efforts and public interest benefits notwithstanding, we do not believe that a permanent waiver of the newspaper-broadcast cross-ownership rule is warranted. As explained in detail below, however, these are difficult and unique circumstances, and we believe that the public interest is better served by extending the waiver of the newspaper-broadcast cross-ownership rule as applied to the *Courant*-WTXX combination to coincide with the renewal cycle for the licenses of both WTXX and WTIC-TV. This should enhance the likelihood that Tribune can sell one or both of the Stations on commercially reasonable terms, and thus provide the best hope that WTXX will remain on the air and as a source of news, information, and entertainment for citizens in the Hartford DMA.¹⁰

II. DISCUSSION

A. Waiver Standard

5. The daily newspaper cross-ownership rule was instituted to promote diversity of viewpoint and economic competition.¹¹ Of these two goals, the Commission has stated that “fostering diverse viewpoints from antagonistic sources is at the heart of its licensing responsibility” and the primary concern underlying this rule.¹² In adopting the rule, the Commission determined that, as a general rule, granting a broadcast license to an entity in the same community as that in which the entity also publishes a newspaper would harm local diversity.¹³ When the Commission adopted the blanket prohibition on newspaper-broadcast cross-ownership, it foresaw the need for waivers of the rule in certain circumstances: (1) where a licensee is unable to sell a station; (2) where the only sale possible would be at an artificially depressed price; (3) where separate ownership and operation of the newspaper and the broadcast station could not be supported in the locality; or (4) where, for whatever reason, the purposes of the rule would be disserved by its application.¹⁴ These waiver standards were originally designed to govern divestiture of combinations formed prior to implementation of the rule, but they have also been applied to other permanent and temporary cross-ownership proposals. The Commission has previously

¹⁰ The local television ownership and newspaper-broadcast cross-ownership rules were revised by the Commission in 2003. See *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, and Definition of Radio Markets for Areas Not Located in An Arbitron Survey Area*, 18 FCC Rcd 13620 (2003) (“2002 Biennial Review Order”). The revised rules would have permitted common ownership of the Stations and the *Courant*. Implementation of these rule changes, however, has been stayed by the US Court of Appeals for the Third Circuit. *Prometheus Radio Project v. FCC*, No. 03-3388 (3rd Cir. Sept. 3, 2003); *Prometheus v. FCC*, 373 F.3d 372 at 382 (3rd Cir. 2004). Accordingly, the rules that were in effect at the time of Tribune’s initial application to acquire WTXX remain in effect. We therefore consider Tribune’s *Further Extension Request* using the analytical framework we have traditionally employed to evaluate requests for waiver of our ownership rules.

¹¹ *Newspaper/Radio Cross-Ownership Waiver Policy*, Notice of Inquiry, 11 FCC Rcd 13003 at 13004 (“*Newspaper/Radio NOI*”).

¹² *Newspaper/Radio NOI*, 11 FCC Rcd at 13004.

¹³ *Id.*

¹⁴ *Request for Waiver of the Broadcast-Newspaper Cross-Ownership Rule Relating to WNYW and the New York Post*, 8 FCC Rcd 5341 (1993), *aff’d sub nom. Metropolitan Council of NAACP Branch v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995) (“*WNYW Waiver*”), 8 FCC Rcd at 5348 & n.19; *Newspaper/Radio NOI*, 11 FCC Rcd at 13004-05.

granted several temporary waivers of the rule to provide a period of time to come into compliance,¹⁵ as well as four permanent waivers of the rule.¹⁶ A request for a permanent waiver of the Commission's rule carries with it a "considerably heavier" burden of justification than a temporary waiver.¹⁷ Tribune contends that grant of a waiver is appropriate here because it meets all of the waiver criteria. Although applicants need not demonstrate that they satisfy all four criteria in order to obtain a waiver, we agree that Tribune has provided evidence under the first, second and fourth criteria which demonstrates that an extension of the temporary waiver would serve the public interest. In particular, Tribune has demonstrated that despite its best efforts, it has been unable to sell WTXX, and that there are affirmative public interest benefits to extending the temporary waiver.

B. Application of Waiver Criteria to WTXX-Courant Combination

6. Under the first and second criteria above, waiver is warranted where no sale is possible or where the only possible sale is at an artificially depressed price. Where an extension of a waiver is requested, such as here, the Commission expects to see evidence of efforts to come into compliance with the rules, including among other things, efforts to divest properties, details of offers received, and reasons those offers were not reasonable. From evidence of marketplace conditions, the relative competitive position of Station WTXX and Tribune's efforts to sell the station, requiring a divestiture at this time is likely to result, at best, in a sale at an artificially depressed price, and would pose a substantial risk that the station would cut services or be forced to go dark. This evidence supports grant of a waiver under the first and second criteria.

7. *Market Conditions and Relative Competitive Position of WTXX.* Tribune contends that unique market conditions in the Hartford DMA and the relative competitive position of the Station makes stand-alone operation non-viable. The Hartford DMA has eight commercial television stations and three noncommercial television stations. Station WTXX is a UHF station licensed to Waterbury, which is 30 miles from the center-DMA city of Hartford, and is a WB affiliate. At the time of Tribune's *Further Extension Request*, WTXX ranked fifth among commercial TV stations in the market in terms of all-day audience share.¹⁸ WTXX's share was 3.5%, as compared with 27.5% for the top-ranked station and 26.6% for the second ranked station in the market. Even the combined audience share of WTIC-TV and WTXX was below the shares of either of the two top-ranked stations.¹⁹ Data from Tribune's 2004 annual report show that WTXX's average all-day audience share has risen slightly to 5.5%. At the same time, WTIC-TV's share has fallen by 3.4%.²⁰ BIA has estimated WTXX's share of television station

¹⁵ See, e.g., *Chancellor Media/Shamrock Radio Licenses, Inc.*, 15 FCC Rcd 17053 (2000) (12-month cross-ownership waiver); *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841 (1996) (12-month cross-ownership waiver).

¹⁶ *Kortes Communications, Inc. (Assignor) and Stafford Broadcasting, LLC (Assignee); For Consent to the Assignment of License of Stations WPLB (AM), Greenville, MI and WPLB-FM, Lakeview, MI*, 15 FCC Rcd 11846 (2000); *Columbia Montour Broadcasting Co., Inc. (Assignor) and Community Communications, Inc. (Assignee); For Consent to Assignment of License of Station WCNR(AM), Bloomsburg, PA*, 13 FCC Rcd 13007 (1998); *WNYW Waiver*, 8 FCC Rcd 5341 (1993); *Field Communications Corporation and Kaiser Broadcasting Corporation (Assignor) for Assignment of Licenses of Stations WLVI-TV, WKBD, KBHK-TV, WFLD-TV and WKBS-TV*, 65 FCC 2d 959 (1977).

¹⁷ See *WNYW Waiver*, 8 FCC Rcd at 5348 (citing *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 803 (D.C. Cir. 1988)).

¹⁸ According to the current BIA Database, Station WTXX remains the fifth-ranked station in the market, and WTIC-TV is the fourth-ranked station. *BIA Database* (April 1, 2005).

¹⁹ *Further Extension Request* at 23 (indicating a 3.5% share for WTXX and a 16.5% share for WTIC-TV).

²⁰ Tribune Company, Annual Report for 2004 on SEC Form 10-K at 13 (filed Mar. 2005) (indicating a 5.5% share for WTXX and a 13.1% share for WTIC-TV).

advertising revenue at 5%, as compared with 30% and 24% for the two market leaders.²¹

8. Tribune asserts that because the market is sandwiched between two much larger DMAs—New York (#1) and Boston (#6)—stations in this market compete not only with each other, but also with the many out-of-market stations whose signals are available in the DMA.²² Tribune has argued that television stations in the market face substantial competition from cable television. The Hartford DMA has one of the highest cable penetration rates in the country, at 89%.²³ Another 6% of market households subscribe to other multichannel video providers.²⁴ Tribune states that some cable networks reach more television households in the market than does WTXX,²⁵ and that 36 cable channels in the market earn a share of one or higher.²⁶ When measured against both cable networks and over-the-air stations, WTXX had an average all-day audience share of just 2.4% in 2004.²⁷ Stations in the market compete with cable not only for viewers, but also for advertising revenue—a cable advertising “interconnect” allows an advertiser to reach all of the market’s cable households without contacting a broadcaster.²⁸

9. Although the *Courant* is the leading daily paper in the city of Hartford (circ. 202,914), Tribune contends that several other important dailies serve the market, including the *New Haven Register* (circ. 100,948), the *Waterbury Republican-American* (56,151) and the *New London Day* (39,768). Each of these daily papers is the leader in its respective city.²⁹

10. We agree with Tribune that, at the present time, it remains unlikely that a buyer of WTXX alone would be able to operate the Station over the long term and maintain existing services. Indeed, these were the very considerations that led the Commission to grant Tribune a permanent, “failing station” waiver of the local television ownership rules. That waiver recognized that operating WTXX in conjunction with WTIC-TV afforded the best chance of preserving and enhancing WTXX’s service. With additional time, Tribune’s further investment in and improvements to the Station may make the Station more marketable—either alone or in combination with WTIC-TV.

11. *Efforts to Sell the Station.* According to progress reports filed with the Commission and the *Further Extension Request*, Tribune has been unable to identify a buyer with a definite source of financing that wants to purchase the Station—or both Stations—at a fair price and operate it independently. Prospective buyers have sought to maintain some form of joint operation with Station WTIC-TV,³⁰ and have sought other conditions such as limitations on cable carriage of a New York station

²¹ *Further Extension Request* at 24. Even the estimated combined ad revenue for WTIC-TV (14%) and WTXX (5%)—19%—was well below that of the market leaders. *Id.*

²² *Id.* at 21-22, 29 (listing a total of 30 stations in five states which can be viewed in some or all of the Hartford DMA).

²³ *BIA Database* (April 1, 2005).

²⁴ *Id.*

²⁵ Tribune Company Comments in MB Docket No. 02-277 at 38 (filed Jan. 2, 2003).

²⁶ *Id.*

²⁷ Tribune Company, Annual Report for 2004 on SEC Form 10-K at 13 (filed Mar. 2005).

²⁸ *Further Extension Request* at 25.

²⁹ *Id.* at 23. Tribune also showed that less than 5% of the readers of the *Courant* reside in New Haven County, where Station WTXX is located. *Id.* at 27-28.

³⁰ Certain joint arrangements—such as an LMA—would result in the WTXX remaining attributable to Tribune and thus would not comply with our multiple ownership rules.

owned by Tribune and carried on certain Hartford market cable systems.³¹ As discussed above, a temporary extension will afford Tribune additional time for a divestiture of both Stations, if that is the course Tribune chooses to come into compliance with our rules.

12. Tribune's efforts to divest the Station began even while its application to acquire WTXX was pending in Spring 2000, when it contacted several group owners about acquiring WTXX alone or a WTIC-TV/WTXX combination, either through sale or a station swap. No mutually agreeable deal emerged from the contacts.³²

13. Upon grant of its transfer application, Tribune continued its divestiture efforts by retaining a reputable media broker and station appraiser. After appraisal, Tribune entered into a listing agreement with the broker, and a confidential offering memorandum was prepared to market the Station. Both Tribune and its broker identified and contacted potential buyers, made direct mass mailings to industry contacts and placed advertisements in trade publications.³³ The offering memorandum was submitted to any party willing to sign a standard non-disclosure agreement, and proposals were requested by January 11, 2002, to allow for compliance with the February 6, 2002 divestiture deadline.³⁴ On January 13, 2002, Tribune received one offer for the Station for a purchase price "that was in the range supported by the appraisal."³⁵ It maintains, however, that other conditions imposed by the prospective purchaser (e.g., seller financing and certain rights to "put" the Station back to Tribune after three years) made the offer unacceptable to Tribune. Tribune states that when it attempted to negotiate, that prospective purchaser withdrew its offer.³⁶ When these efforts failed, Tribune sought and obtained its first waiver extension.

14. Tribune continued its efforts and in April 2002, its broker again contacted all clients with information about the availability of Station WTXX for purchase.³⁷ Several other expressions of interest and proposals were generated since then. However, these proposals were unacceptable to Tribune due to additional conditions attached to the offers or other reasons similar to those above.³⁸ In progress reports filed subsequent to the *Further Extension Request*, Tribune reports that it remains in contact with the broker it retained to sell WTXX, but that the efforts of Tribune and of its broker have not generated "any viable offers at anything approaching a fair price or unencumbered by unacceptable conditions."³⁹

15. The record demonstrates that Tribune has made good faith efforts to sell the station. Tribune's inability to sell WTXX as a stand-alone station is consistent with the market and competitive conditions discussed above. Tribune also has tried to sell WTXX and WTIC-TV as a combination.⁴⁰ Although Tribune has made such efforts, it is not required to do so. Rather, Tribune may continue to own

³¹ At issue is cable carriage of Tribune Station WPIX, New York, NY. Tribune states that it cannot comply with such a condition because it does not control distribution of Station WPIX, which is carried as a superstation. *Further Extension Request* at 11 and n. 38 (citing 47 U.S.C. § 325(b)(2)(D); 47 C.F.R. § 76.64(b)(2)(2001)).

³² *Further Extension Request* at iii-iv, 8, *Confidential Addendum*.

³³ *Id.* at 9-10.

³⁴ *Counterpoint Extension*, 17 FCC Rcd at 3244 ¶ 4.

³⁵ *Id.* at 3244 ¶ 5.

³⁶ *Id.*

³⁷ *Further Extension Request* at 10.

³⁸ *Further Extension Request* at 11-13, *Confidential Addendum*.

³⁹ See, e.g., *Confidential Status Report* (filed May 17, 2004).

⁴⁰ *Further Extension Request* at iii-iv, 8, *Confidential Addendum*.

and operate WTIC-TV and the *Courant* until WTIC-TV's renewal comes up in 2007.⁴¹ If we were to require Tribune to immediately divest WTXX, it would likely sell the Station as a stand-alone, rather than sell both WTXX and WTIC-TV under unfavorable conditions. The sale of WTXX alone would increase the likelihood that the Station and its service to Waterbury would be unsustainable.

16. *Additional Public Interest Factors Supporting Waiver.* Under the fourth criterion governing waiver of the newspaper-broadcast cross-ownership rule, the Commission considers whether, for whatever reason, the purposes of the rule would be disserved by its application. In the instant case, the public interest benefits that will result from Tribune's continued common ownership of WTXX through the Station's current license term outweigh any potential harm to the underlying goals of the newspaper-broadcast cross-ownership rule. Tribune has a clear record of enhancing and expanding the Station's service to the public and the record evidences a significant risk that requiring immediate divestiture would severely curtail that service or eliminate it altogether.

17. *Tribune's Ownership of WTXX Has Preserved and Improved Service to Viewers.* As clearly evidenced by the Commission's grant of a "failing station" waiver, WTXX was not viable as a stand-alone operation at the time it was acquired by Tribune.⁴² At the time Tribune acquired WTXX, the Station's owner couldn't pay its bills or meet payroll. The loss of WTXX would have deprived Waterbury of its only licensed television station and the local service that station provided and darkened the Hartford DMA's WB network affiliate. Tribune has contributed significant resources to WTXX, upgraded the Station's equipment, and expanded programming and services. Notwithstanding these efforts, WTXX remains a failing station. Tribune's acquisition of WTXX prevented loss of service and has resulted in significant investment in and improvements to the Station's facilities and offerings:

- WB20 Student News ("WSN"), a "student-centered program designed to give students real-world experiences in broadcast journalism and production," allows local youth to produce news reports on issues that interest and affect children. According to schedules on the WTXX website, WSN segments air an average of three times per day, seven days per week.⁴³
- WTXX broadcasts a 30-minute newscast daily at 10 PM.⁴⁴
- WTXX broadcasts Catholic mass daily at 10 AM and offers five other weekly religious programs.⁴⁵
- "Beyond the Headlines," a weekly public affairs show (which is repeated several times

⁴¹ See Note 2, *supra*.

⁴² In support of its failing station waiver, Tribune demonstrated that: (a) Station WTXX had an all-day audience share of less than 4% (i.e., a 1 rating and a 2 audience share) for a three-year period; (b) Station WTXX was failing financially (i.e., financial data in the record included evidence that the Station incurred net operating losses of \$415,000 in 1995, \$725,000 in 1996, and \$447,000 in 1997); (c) public interest benefits would result from common ownership and operation of the stations. See *Counterpoint*, 16 FCC Rcd at 15046.

⁴³ See *WSN Broadcast Schedule*, available at: <http://wb20.trb.com/community/news/studentnews/wtxx-wsn-schedule.0.2750853.story> (viewed April 2, 2005).

⁴⁴ *Further Extension Request* at 19. This programming was available on WTXX prior to Tribune's acquisition of the Station, but was made possible through a management services agreement between Tribune and the previous owner. Tribune pledged to continue offering this programming in connection with its request for a local TV rule waiver. See *Counterpoint*, 16 FCC Rcd at 15046-7 ¶ 6.

⁴⁵ *Further Extension Request* at 20. Roman Catholic Mass was available on WTXX prior to Tribune's acquisition of the Station. Tribune pledged to continue offering such programming in connection with its request for a local TV rule waiver. See *Counterpoint*, 16 FCC Rcd at 15046-7 ¶ 6.

throughout the week) began airing on WTXX in Spring 2002.⁴⁶

- WTXX commenced digital operations pursuant to special temporary authorization on December 23, 2002.⁴⁷

18. Tribune has delivered on every public interest benefit that it identified in its initial application to acquire WTXX. There, Tribune pledged to continue offering Catholic mass and local news on WTXX, to begin public affairs and student programming on the Station, to buildout the Station's digital facilities, and to commence digital operations.⁴⁸ Given Tribune's record of enhanced service to the public, and its stated plans to continue and expand such service in the future,⁴⁹ we expect that Tribune will continue to invest in the Station and expand programming and services available to viewers.

19. *Permanent Relief Not Warranted.* Although Tribune has met its burden for a temporary waiver, we do not agree that a permanent waiver warranted here. In light of evidence concerning Tribune's efforts to sell WTXX, we conclude that Tribune has not acted unreasonably in rejecting the offers it has received thus far. Nevertheless, the Commission has noted that waivers based on an inability to sell should be "of reasonable duration, so that we shall not always be bound by a result based on outdated information."⁵⁰ Further, "we do not contemplate permanent waiver, for problems in disposing of these interests would not be expected to endure indefinitely."⁵¹ Tribune has not demonstrated—and we have no basis to assume—that market or economic conditions will not improve, or that the value of station will not be enhanced by Tribune's efforts such that it will become more attractive to potential buyers in the future. Because we grant Tribune's request for a temporary waiver pending renewal, we need not consider its alternate request for a waiver pending the ultimate outcome of the Commission's reexamination of the newspaper-broadcast cross-ownership rule.⁵²

20. In extending Tribune's waiver, we again emphasize that we are doing so only temporarily, and based only on the unique circumstances present here. The Commission itself already has determined that WTXX is at a real risk of failure if it operates alone. A forced sale of the station – when its combination with WTIC-TV has produced benefits for the public, and when Tribune has attempted to sell both as a package – would appear to serve the public interest less than allowing the *Courant*-WTXX combination to continue for the temporary period authorized herein. At the end of the extension period, should Tribune still not be in compliance with the rules then in effect, the Commission will have a fuller range of options available to it to resolve any continuing problems.

21. During the pendency of the *Further Extension Request*, the Media Bureau sent a letter to

⁴⁶ *Further Extension Request* at 20.

⁴⁷ See FCC File Nos. *BDSTA-20020711ACQ*; *BEDSTA-20040901AEJ*. Before construction was complete, Tribune estimated the cost of building out digital facilities for WTXX-DT at \$750,000 - \$1 million. *Further Extension Request* at 21.

⁴⁸ See *Counterpoint*, 16 FCC Rcd at 15046.

⁴⁹ See *Further Extension Request* at 20 (discussing programming purchases and plans to continue certain news, public affairs and entertainment programming).

⁵⁰ See *Newspaper-Broadcast Order*, 50 F.C.C. 2d at 1085.

⁵¹ *Id.* at n. 46.

⁵² *Further Extension Request* at 39-41. As an alternative to grant of a waiver through the renewal term, Tribune proposed a temporary waiver through the completion of the newspaper-broadcast cross-ownership proceeding, which became part of the Commission's 2002 Biennial Review proceeding. The rules adopted in that proceeding were remanded to the Commission. See *Prometheus v. FCC*, 373 F3d 372 (3rd Cir. 2004). In addition, multiple requests for Supreme Court review are pending.

counsel for Tribune which stated that Tribune was “in full compliance” with the Commission’s multiple ownership rules and the waiver granted in *Counterpoint Extension*.⁵³ In the future, we expect that the Commission will make determinations concerning the compliance or noncompliance of licensees with the terms and conditions of waivers granted by the Commission. We also do not intend to continue the practice of allowing waivers to remain in force through inaction for long periods of time. Rather, we expect to address compliance with the terms of waivers as their expiration dates approach.

III. CONCLUSION

22. A rule waiver is appropriate where the underlying purpose of that rule will not be served by its application in a particular case. A temporary waiver until the Commission has completed its review of renewal applications for Stations WTIC-TV and WTXX would permit Tribune additional time to further improve the joint performance of the Stations and thus the chances that they might be sold without a substantial risk of loss of service to the community. Such a waiver also recognizes Tribune’s substantial investment in developing WTXX, including the costs of digital conversion.

23. Accordingly, IT IS ORDERED, That Tribune’s request for a permanent waiver of the newspaper/broadcast cross-ownership rule, Section 73.3555(d) of the Commission’s Rules, IS DENIED.

24. IT IS FURTHER ORDERED, That Tribune’s request for an extension of its temporary waiver of the newspaper/broadcast cross-ownership rule, Section 73.3555(d) of the Commission’s Rules, IS GRANTED for a period of time until the Commission’s action on the renewal application for Station WTXX becomes a final order, subject to Tribune continuing its efforts to sell WTXX and its filing of status reports concerning these efforts every 45 days, and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵³ See Letter from W. Kenneth Ferree, Chief, Media Bureau, to Tribune Television Co. c/o R. Clark Wadlow, Esq. (Sept. 5, 2003).

**JOINT STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN,
CONCURRING**

Re: Counterpoint Communications, Inc. (Transferor) and Tribune Television Company (Transferee), Request for Extension of Waiver of Section 73.3555(d) of the Commission's Rules for Station WTXX(TV), Waterbury, CT

We have been deeply troubled by the Commission's long *inaction* on this and other overdue waivers of our media ownership rules. In this case, we are also troubled by the Bureau's *action* in sending a letter to Tribune stating that the company was in full compliance with our rules. Notwithstanding these disagreements with the Commission's failures in this case, we reluctantly concur in the overall decision. We concur because the Commission at long last conducts the public interest analysis in this case that it should have conducted years ago. We concur because the Commission does a better job here of fleshing out the standard it will apply as it processes waiver requests. We concur because the Commission states that, henceforth, it will address waivers as they come due and not permit them to remain in force through Commission inaction. We would have preferred the Commission to indicate a time limitation for our processing of such requests, but today's item at least improves upon the current process. And we concur because the Commission makes clear that it expects to see clear evidence of serious and sustained efforts to come into compliance with our rules before it will consider granting any extension.

When the Commission approves a transaction that does not fully comply with its rules, the Commission has often granted a temporary waiver to allow the acquiring company to come into compliance with the media ownership limits. Yet companies routinely file requests to extend waivers and the Commission too often fails to either address those requests or to enforce its rules once a waiver has lapsed. This has been an unconscionable abdication of responsibility that does nothing to provide predictability and certainty, leave alone to safeguard the public interest. The Commission has allowed companies to avoid compliance with our rules and to hold licenses—sometimes for years—in the hope that our media concentration protections will one day be loosened and these waived deals can then be made permanent. In effect, the Commission's inaction has allowed companies to push the consolidation envelope ever further.

How much better it would be if the Commission would address pending waiver requests in a timely manner, evaluate whether such waivers indeed serve the public interest, and then enforce its ownership rules. In the present case, the Commission finally approaches meeting this responsibility, albeit two and a half years after the waiver technically expired.

This case presents a tough decision for us. We disagree with the process followed – both the Commission's protracted inaction and the Bureau's intervening action in sending its letter to Tribune. Nevertheless, we believe we must look at the specific facts of this case and determine if the public interest is served by granting a further extension.

There are clearly times when the public interest is served by granting a waiver or an extension. But we believe we must conduct a rigorous public interest analysis before granting such actions. In this case, the Commission not only finds public interest benefits, but also examines and evaluates whether Tribune has made best efforts to divest WTXX either alone or in combination with WTIC. Given Tribune's documented efforts, as well as ***the significant possibility that either the station might go dark or service to the community would be reduced*** without additional time for Tribune to divest, we will reluctantly concur. We are in full support, however, of the Commission's decision to deny a permanent waiver in this matter. Tribune has simply not made the case for a permanent waiver. We would also

point out that through this decision, the Commission implicitly recognizes that a permanent waiver for the Hartford matter has the clear potential to undermine localism, competition, and diversity.

Although the Commission finds that the public interest would be served by granting an extension in this case, other waivers of our ownership limits have also lapsed. These other cases may not present affirmative public interest benefits justifying an extension of a waiver or evidence that the company has made efforts to come into compliance with our rules. The Commission commits in this Order not to let waiver petitions languish and, in effect, be granted through inaction. Companies that seek waiver extensions are now on notice that they must demonstrate their efforts to come into compliance with our rules and that any waiver extension will serve the public interest. We expect the Commission to carry through with its commitments, and we also expect companies to comply with the terms of their waivers.