Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re Application of	)	
	)	
COUNTERPOINT COMMUNICATIONS,	)	
INC.	)	File No. BTCCT-19991116AJW
(Transferor)	)	Facility ID No. 14050
and	)	
	)	
TRIBUNE TELEVISION COMPANY	)	
(Transferee)	)	
	)	
For Consent to the Transfer of Control of	)	
Tiberius Broadcasting, Inc., Licensee of	)	
WTXX(TV), Waterbury, CN	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 2001 Released: August 3, 2001

By the Commission: Commissioners Tristani and Copps concurring and issuing separate statements.

1. The Commission herein considers the above-captioned application to transfer control of Tiberius Broadcasting, Inc., licensee of WTXX(TV), Channel 20 (UPN), Waterbury, Connecticut, from Counterpoint Communications, Inc. ("Counterpoint") to Tribune Television Company ("Tribune"). This application is unopposed.

2. Tribune currently manages WTXX pursuant to a "Management Service Agreement" dated December 24, 1997.[1] Tribune also owns and operates WTIC-TV, Channel 61 (Fox), Hartford, Connecticut, which is located in the same DMA (Hartford) as, and has overlapping Grade B signal contours with, WTXX. Because this would be the second station in the DMA owned and operated by Tribune, its proposed acquisition of WTXX is governed by Section 73.3555(b)(2) of the Commission's Rules, 47 C.F.R. §73.3555(b)(2). That rule provides, in pertinent part, that the same entity may own or control two television stations in the same market so long as: (i) at the time the application is filed, at least one of the stations is not ranked among the top four stations in audience rankings in the DMA; and (ii) at least 8 independently owned and operating full-power commercial and noncommercial educational television stations would remain

[1] Notwithstanding the nomenclature of the agreement between the parties, Tribune states that it provides "management services and programming to WTXX under [this agreement], which gives Tribune an attributable interest in WTXX under the Commission's ownership rules." Thus we treat that agreement as the equivalent of a local marketing agreement (LMA). *See* Section 73.3555, note 2 (k)(2).

in the market after the proposed acquisition. Although WTXX is not ranked among the top four stations in the DMA, there would not be 8 remaining independently owned and operated television stations in the Hartford DMA following the proposed merger. However, Tribune requests a waiver of Section 73.3555(b)(2) to permit it to acquire WTXX on the basis that it is a "failing" station. *See Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12935-40 (1999) (*"Local Ownership Order"), recon. granted in part,* 16 FCC Rcd 1067 (2001) ("*Local Ownership Reconsideration"*).

3. While the instant application was pending, Tribune filed an amendment to report that on June 12, 2000, it acquired Times Mirror Co. ("Times Mirror"), which, among other things, owns and controls *The Hartford Courant*, a daily newspaper published in Hartford, a community located within the Grade A signal contours of both WTXX and WTIC. 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. While Tribune states that it can own both WTIC and *The Hartford Courant* until the next renewal of the WTIC license (April 1, 2007),[2] Tribune's acquisition of *The Hartford Courant* during the pendency of its earlier-filed request to acquire control of WTXX triggers immediate application of the television/newspaper cross-ownership rule to its proposed purchase. Tribune therefore requests a two-year period following the consummation of the proposed acquisition of WTXX to achieve compliance with Section 73.3555(d)(3) of the Rules.

4. **Duopoly Waiver.** The Commission's *Local Ownership Order* established the criteria for a waiver of the television duopoly rule for a "failing station" -- one which has been struggling for "an extended period of time both in terms of its audience share and financial performance." These criteria are:

(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. "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. "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."

[2] As the Commission pointed out in adopting the broadcast/newspaper cross-ownership prohibition, "if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of its stations there within 1 year or by the time of its next renewal date, whichever is longer." *Amendment of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations,* 50 FCC 2d 1046, 1076, n. 25 (1975).

(d) The in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; selling the station to an out-of-market buyer would result in an artificially depressed price.[3]

If the applicant satisfies each criterion, a waiver of the rule will be presumed to be in the public interest. 14 FCC Rcd at 12939. Moreover, in the case of LMAs, applications based on a waiver may be based on circumstances as they existed at the time just prior to the parties entering into the LMA. 14 FCC Rcd at 12964.

5. It appears that Tribune has satisfied each of the above criteria such that we can presume that waiver of the duopoly rule, as requested in this case, is in the public interest. Specifically, Tribune has submitted Nielsen Station Index ratings information for the Hartford market that demonstrates that, between 1995-97, the three years prior to Tribune's Management Services Agreement with Counterpoint, WTXX has had an all-day audience share of less than 4 percent (in those years, WTXX earned a 1 rating and a 2 audience share in the market). In addition, Tribune has submitted financial information (income statements, balance sheets and tax information) supporting a finding that it meets the "poor financial condition" prong of the "failing" station test.[4] Based upon the analysis including the public interest benefit prong outlined below, we conclude that Tribune has satisfied the requirements established in the *Local Ownership Order* for a "failing station" waiver of the duopoly rule.

6. **Public Interest.** As to the public interest benefits to be achieved in this case, Tribune notes that it has already made and will continue to make significant financial commitment to the station's physical plant and equipment (including the expeditious conversion to digital television operations), and will continue to carry local programming made possible by the combined operation of the two stations (*e.g.*, a nightly 30-minute news program on WTXX adapted from WTIC's 60-minute news broadcast). Tribune states that it has made a five-year commitment to carry the Roman Catholic Mass currently carried on WTXX daily (which it claims is a commitment of over 1825 programming hours valued at $2 million). Tribune also pledges to produce a new,

[3] 14 FCC Rcd at 12939. Ordinarily, the applicant for a failing station duopoly waiver must demonstrate that active and serious efforts were made to sell the station to an out-of-market buyer and the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station. However, this showing is not required of a waiver applicant that seeks to acquire a station with which it formed an LMA arrangement prior to the adoption of the *Local Ownership Order*. *See Local Ownership Reconsideration*, 16 FCC Rcd at 1077. Such is the case here, where Tribune has had an LMA arrangement with WTXX since December 1997.

[4] Tribune states that, for the three years prior to entering into the LMA, WTXX incurred net operating losses of approximately $415,000 in 1995, $725,000 in 1996, and $447,000 in 1997. It maintains that Counterpoint's consistent negative cash flows from operations produced larger negative equity balances – its 1996 year-end balance sheet showed a deficit equity position of $988,167 (increasing to over $1.8 million after factoring in its net operating loss), which increased to over $2.1 million through November, 1997, following the accumulated net operating loss to that point. It notes that Counterpoint did not have a net operating deficit for 1997 because it transferred substantially all its assets and liabilities to Tiberius, resulting in a recognized gain to Counterpoint of $2.579 million because its substantial liabilities were reduced.

monthly 30-minute prime-time public affairs program addressing local issues, and a new, weekly 30-minute public affairs show hosted by, and directed to issues of concern to, local high school students. Tribune maintains that the costs of these programs could not be justified for either station alone, but that the efficiencies of joint operation will make such an investment sustainable. Based on the information described above, we believe that grant of the application serves the public interest convenience and necessity.

7. **Television/Newspaper Cross-Ownership Rule.** As noted previously, after this application was filed, Tribune acquired *The Hartford Courant* as part of its acquisition of Times Mirror. It now requests time to come into compliance with the television/newspaper cross-ownership rule. Specifically, Tribune seeks authority to own WTXX and WTIC, as well as *The Hartford Courant,* for a period of two years from the date of the closing on its acquisition of WTXX. It maintains that such a period will permit it sufficient time to pursue a transaction that will allow it to achieve compliance with the Commission's ownership rules.

8. In support of its request, Tribune notes that WTXX's dire financial condition makes the station not viable as a stand-alone station. In this regard, Tribune states that, since its acquisition of *The Hartford Courant*, it has tried diligently, but ultimately unsuccessfully, to find a buyer for WTXX alone or for WTIC and WTXX together. Tribune asserts that the requested two-year period of common ownership and operation "should permit [it] sufficient time to improve the financial condition of WTXX and to come into compliance with all applicable local ownership rules."

9. Based on the information before us, we believe that granting Tribune a temporary period to come into compliance with the television/newspaper cross-ownership rule is appropriate. In this case, Tribune sought authority to acquire WTXX prior to its acquisition of *The Hartford Courant.* Moreover, Tribune's ownership of *The Hartford Courant,* and the resulting television/newspaper ownership violation, is only one aspect of a multi-market, multi-newspaper transaction that comprised Tribune's purchase of the Times Mirror. Where similar, isolated ownership violations are presented in multi-market transactions involving multiple broadcast stations, the Commission has routinely afforded applicants a reasonable period of time in which to come into compliance with the relevant rules. And, the Commission has expressly permitted such a compliance period where two television stations and a newspaper were commonly owned by a single entity. *Fox Television Stations,* FCC 01-209 (released July 25, 2001). Thus, we believe that Tribune should also be accorded a reasonable time to bring its Hartford media assets into compliance with our rules.

10. With respect to the length of time to be afforded Tribune, we note that in the *Fox* case the Commission granted the applicant a 24-month period to achieve compliance with the rules, in part because the market involved, New York City, was a highly diverse media market. Hartford, however, ranked as the 27th television market in the country, is a substantially less diverse market than New York. The Hartford DMA contains 11 commercial and noncommercial educational television stations (versus 20 in the New York City DMA); 25 AM/FM radio stations (versus 97 in New York); 88 percent cable

penetration (second highest in the nation) (versus 67 percent in New York), with more than 56 different programming services; and 12 daily and more than 20 weekly/alternative/college newspapers (36 daily, 338 other in New York). Moreover, unlike the case in *Fox* where the newspaper was ranked the lowest in the market by circulation, *The Hartford Courant* is the dominant paper in the Hartford market with more than double the daily circulation of its closest competitor.[5] In applying its public interest analysis to the transaction at hand, the Order balances the grant of a compliance period against any potential harm to diversity and competition in the market. Balancing this level of diversity in the Hartford market against the need of the applicant for a reasonable period of time to bring its media assets into compliance with our rules, we conclude that a significantly shorter period of time is appropriate. We will, therefore, accord Tribune six (6) months in which to bring its interests into compliance with the Commission's relevant ownership rules. We expect Tribune to exercise its best efforts to sell the necessary assets to come into compliance with the rule. The temporary loss of diversity in the Hartford market during this period due to Tribune's common ownership of WTIC and WTXX and *The Hartford Courant* will be outweighed by the benefits of permitting an orderly sale of media properties to a qualified buyer that will preserve these stations as media voices in the market. In addition, during this time, the viewers in Hartford will realize the programming and other benefits to which Tribune has committed and that would not otherwise be achieved in the case of WTXX as a stand-alone operation. Under these circumstances, we believe that the public interest is served by granting this short term temporary waiver of Section 73.3555(d)(3) of the Commission's Rules.

11. We have reviewed the transfer of control application, and find that the applicants are fully qualified, and that the grant of that application, as described herein, will serve the public interest, convenience and necessity.

12. Accordingly, IT IS ORDERED, That the request for a "failing station" waiver of the television duopoly rule, Section 73.3555(b)(2), to permit Tribune to own and operate both WTIC and WTXX, IS GRANTED.

13. IT IS FURTHER ORDERED, That, from the date this transaction is consummated, Tribune IS GRANTED a temporary six-month period within which to come into compliance with the television/newspaper cross-ownership rule, Section 73.3555(d)(3), as described herein.

[5] Source: 2000 Bacon's Newspaper Directory, p. 1971.

14. IT IS FURTHER ORDERED, That the application (BTCCT-19991116AJW) for consent to the transfer of control of Tiberius Broadcasting, Inc., licensee of WTXX(TV), Waterbury, Connecticut, from Counterpoint Communications, Inc. to Tribune Television Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Concurring Statement of Commissioner Gloria Tristani

Re: Transfer of Control of Tiberius Broadcasting, Inc., Licensee of WTXX (TV), Waterbury, Connecticut, from Counterpoint Communications, Inc. to Tribune Television Company

I am deeply troubled by the level of media concentration that would exist in Hartford as a result of this transaction. The ownership of the dominant newspaper and two television stations in a small market such as Hartford is unprecedented. Tribune will exercise significant control over the flow of public discourse in Hartford while they hold these three media properties.

I am also troubled by the fact that the temporary waivers we grant are not incidental to a larger transaction but in fact represent the essence of the transaction before us. In previous cases, the Commission granted temporary waivers where a relatively small component of the resulting combination would violate one or more of our ownership rules. Here, Tribune owns a television station and the dominant newspaper in Hartford. It now seeks to acquire a second television station. This transaction represents the entire deal. There are no other assets being transferred such that the Hartford situation can be viewed as "incidental" to a broader multi-market transaction. This is new ground for the Commission, and I do not expect this type of waiver to be granted in the future absent the same circumstances that justify the instant waiver.

However, unlike previous broadcast transactions with which I have disagreed, this decision contains affirmative public interest benefits justifying the transfer of the station license to Tribune. First, and most important, is that this decision ensures that Hartford will not lose a television station. While I am not pleased that this station, along with a second station in Hartford, will be controlled by Tribune, I have previously stated that I would be willing to support such ownership structures under certain limited circumstances.[6] Second, the Order identifies additional potential benefits flowing from this license transfer, including ongoing and future improvements to local programming and greater levels of investment in the weaker station. These steps, while not dispositive, further establish that the public interest ultimately is served by this transaction.

My concurrence in this license transfer is also predicated on the Commission's express requirement that Tribune will use "best efforts" to sell one or more of its properties to come into compliance with our rules in the next six months. "Best efforts" is a meaningful and well-established standard in commercial law, and Tribune should not anticipate receiving additional time beyond this six month period. For the foregoing reasons, I concur in the license transfer of WTXX from Tiberius Broadcasting to Tribune.

[6] *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order (rel. Aug. 6, 1999)(Statement of Commissioner Gloria Tristani)

CONCURRING STATEMENT
OF COMMISSIONER MICHAEL J. COPPS

Re: *Transfer of Control of Tiberius Broadcasting Inc., licensee of WTXX-TV, from Counterpoint Communications, Inc., to Tribune Television Company*

Although I am troubled by this transaction, I concur in the Commission's decision to transfer the license for WTXX-TV to the Tribune Television Company. After close and careful deliberation, I conclude that the public interest benefits to be derived from this transaction outweigh, albeit narrowly, the strong arguments against it.

First, the community will receive a very tangible benefit from WTXX remaining a viable station beyond the termination of its programming agreement with WTIC. WTXX has been in danger of failing for a number of years and the public interest would not be served were this station to go dark. Although I am extremely troubled by the fact that this transaction creates a television station duopoly in a market without sufficient media diversity to support such a duopoly, it seems to me better for one company to own two stations in this market than for one of those stations not to exist at all. Additionally, WTXX is the only outlet in the Hartford market for UPN, a network that the Commission has previously recognized for presenting programming targeted to minorities as well as providing opportunities for minorities in the creation, production and writing of programming.

Second, while this transfer violates the Commission's newspaper/broadcast ownership rule, today's decision requires the company to divest the necessary properties to come into compliance with the rule within six months. This tight six-month waiver is far more appropriate than the twenty-four month waiver recently granted to News Corporation. For a Commission that continues to take seriously its ownership rules, a waiver to allow a party to come into compliance should be a matter of months, as it is here, rather than years. I would expect the company's divestiture efforts to begin immediately.

Nevertheless, this transaction highlights the need for the Commission to revisit a serious problem in its newspaper/broadcast rule. The current rule allows the owner of a television station to acquire and hold a newspaper in ostensible violation of this prohibition until the station's license comes up for renewal, oft-times many years later. Tribune at present owns WTIC and the *Hartford Courant*, the dominant paper in the market, yet has until 2007 to come into compliance with the rule. If the short term waiver granted today *vis-à-vis* the WTXX-*Hartford Courant* combination results in either the sale of the *Hartford Courant* or the sale of WTXX with the concomitant sale of WTIC within six months, the community will be served by the increased diversity achieved by the company's early compliance with the newspaper/broadcast rule. In any event, the transaction before the Commission today underscores the need to review this problem in a rulemaking, with an eye toward making certain that when a newspaper is acquired by a broadcast licensee, the Commission has the tools to ensure diversity of voices in the media market at the time of the transfer rather than years in the future.

In conclusion, my analysis of this transaction persuades me that, on balance and by the barest of margins, the public interest is served by allowing it to proceed.