Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Application for Consent to Assignment of	)	MB Docket No. 13-189
Broadcast Station Licenses from Belo Corp.	)	
To Gannett Co., Inc., Sander Operating Co.	)	
and Tucker Operating Co.	)	

JOINT REPLY TO OPPOSITIONS

Matthew Wood
Andrew Jay Schwartzman
Lauren Wilson
Free Press
1025 Connecticut Ave. NW, Suite 1110
Washington, D.C. 20036
(202) 265-1490

Eric G. Null*
Angela J. Campbell
Institute for Public Representation+
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535

Counsel for NABET-CWA, TNG-CWA, National Hispanic Media Coalition, Common Cause, Office of Communication, Inc. of the United Church of Christ

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* Admitted to the New York bar only; DC bar membership pending. Practice supervised by members of the DC bar.

+ IPR would like to thank Sean Vitka, Google Policy Fellow, for his research and drafting help.

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SUMMARY

Free Press, NABET-CWA, TNG-CWA, National Hispanic Media Coalition, Common Cause, and Office of Communication, Inc., of the United Church of Christ (collectively "Petitioners") filed a Petition to Deny several license assignments from Belo Corp. to either Sander Operating Company or Tucker Operating Company. Oppositions were filed by Gannett Co., Belo Corp., Sander Operating Cos., and Tucker Operating Cos. This reply responds to their arguments.

The Federal Communications Commission's public interest standard is a broad concept that includes an analysis of the effects on diversity of media voices, competition among broadcasters, and localism. The Commission can also review other harms and benefits. Petitioners have made a prima facie showing that the license assignments, in conjunction with the sharing agreements, will hurt the public interest. This transaction is harmful to diversity because common operation of multiple stations (including shared programming, shared offices, and shared advertising agents) will reduce the number of independent voices available to the public. Competition is harmed for the same reason: when multiple broadcasters work cooperatively, they will not compete for advertising or viewership. Localism is undermined because there are fewer outlets originating local news content, and less of the public will be represented. Thus, the proposed transaction will create relationships that result in the same harms as a transaction that, on its face, violates the media ownership rules.

Applicants have failed to rebut this prima facie case; they assume there is no public interest harm without a rule violation, and largely ignore the public interest analysis the Commission is statutorily required to undertake. In its Opposition, Gannett emphasizes its supposed "economies of scale" that will allow it to compete against other media, but these claims

are wholly unsubstantiated. Moreover, the relevant competitive market in these broadcast licensing determinations is the market for local news, not the market for online or mobile services. Gannett makes no attempt to explain why the license assignments *in this case* will benefit the public, diversity, competition, or localism.

Finally, Petitioners disagree that the Commission can only address sharing arrangements in a rulemaking. It is a fundamental principle of administrative law that agencies may make policy by either adjudication or rulemaking. The Commission routinely uses adjudication to set policy, and the Supreme Court has upheld its ability to do so. While the Commission may ultimately decide to attribute sharing arrangements in the 2010 Quadrennial Review, that possibility does not obviate the need for the Commission to address the public interest questions raised by the sharing agreements in this transaction.

Therefore, Petitioners request the Commission to designate these assignments for hearing.

JOINT REPLY TO OPPOSITIONS

NABET-CWA, TNG-CWA, National Hispanic Media Coalition, Common Cause, and Office of Communication, Inc., of the United Church of Christ (collectively "Public Interest Petitioners" or "Petitioners"), by their attorneys, the Institute for Public Representation, along with Free Press, reply to the Oppositions filed by Gannett, Belo, Sander, and Tucker (collectively "Applicants").

As Petitioners show below, there is no merit to Applicants' claim that the FCC must approve the transaction if it is consistent with FCC rules. Moreover, Applicants' argument that the FCC must address the public interest implications of these sharing agreements through a rulemaking is wrong.[1]

I. THE APPLICANTS HAVE FAILED TO DEMONSTRATE THAT THESE TRANSACTIONS ARE IN THE PUBLIC INTEREST AS REQUIRED BY THE COMMUNICATIONS ACT

The Opposition shows that the central issue presented here is whether an arrangement that has the same effect as a transaction that contravenes the Commission's media ownership rules is in the public interest. Petitioners argue that any transaction that has the same result as a violation of the Commission's media ownership rules is necessarily contrary to the public interest, even if these assignments do not constitute a violation of the rules.

Section 310(d) of the Communications Act commands that "No . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, . . . directly or

[1] Petitioners reiterate their argument at Petition to Deny at 8-10 that the full Commission rather than the Media Bureau should act on the Applications. Pet. Den., *Application for Consent to Assignment of Broadcast Station licenses from Belo Corp. et al*., MB Docket No. 13-189 (July 24, 2013), ("Petition" or "Petition to Deny"); Gannett, at Opp'n Pet. Den., *Application for Consent to Assignment of Broadcast Station licenses from Belo Corp. et al*., MB Docket No. 13-189 (Aug. 8, 2013) ("Gannett Opp."), 2-3, contends that none of the issues raised are novel, but does not cite a single case where the Commission approved a transaction in which the transferred television stations would be airing local news produced by a daily newspaper in the same community.

indirectly . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby."[2] Section 309(d) provides that any party in interest may file a petition to deny the application containing specific allegations of fact to show that the application would be prima facie inconsistent with the public interest.[3] In deciding whether a prima facie showing has been met, "[t]he Commission's inquiry . . . is much like that performed by a trial judge considering a motion for a directed verdict: if all the supporting facts alleged in the affidavits were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established."[4] Section 309(e) requires that "[i]f a substantial and material question of fact is presented or if the Commission for *any reason* is unable to find that the grant of the application" would be consistent with the public interest, "it *shall* formally designate the application for hearing."[5]

In this case, Petitioners have made a prima facie showing that the proposed assignment of licenses of Belo's stations in Phoenix, Louisville, Tucson, Portland, and St. Louis would not be in the public interest. Applicants bear the burden of showing that the assignment, on balance, serves the public interest, and must do so by a preponderance of the evidence.[6] The applicants have not met this burden; therefore, the applications must be denied or designated for hearing.

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[2] 47 U.S.C. § 310(d).
[3] *See* 47 U.S.C. §§ 309(a), 309(d)(2); *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).
[4] *Gencom*, 832 F.2d at 181.
[5] *See* 47 U.S.C. 309(e) (emphasis added); *SBC Communications and AT&T Corp.*, Order, 20 FCC Rcd. 18290, 18300-01 (2005) ("SBC Order").
[6] SBC Order, 20 FCC Rcd. at 18300; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp. to AT&T Comcast Corp.*, Order, 17 FCC Rcd. 23246, 23255 (Nov. 14, 2002) ("Comcast AT&T Order").

A. The Public Interest Requires Consideration of Factors Beyond Whether a Transaction Violates a Commission Rule

The Applicants misstate both the law and the FCC's practice when they claim that the FCC must approve the transaction if it is consistent with FCC rules.[7] The Commission's analysis is not so limited by either the Communications Act or its own rules. Whether the transaction violates a Commission rule or a statute is part of the analysis; but the analysis does not stop there. If there is no rule violation, the Commission considers whether the assignments would harm the public interest *in some other way*, such as "by substantially frustrating or impairing the objectives or implementation of the Act or related statutes."[8] The Commission also looks at potential public interest benefits, and then balances those harms against the benefits.

The public interest standard is necessarily a broad and multi-faceted concept. For example, in reviewing the Comcast-NBCU merger, the Commission analyzed many potential public interest consequences, including harms to diversity and localism as well as advertising, journalistic independence, and employment matters.[9] It analyzed the alleged benefits including claimed economies of scale and scope and found many to be unsubstantiated.[10] Many promises made by Comcast were converted into merger conditions enforceable by the Commission.[11]

Diversity, competition, and localism are necessary elements of the broadcast licensing public interest standard. Diversity assumes that "the widest possible dissemination of

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[7] *See* Gannett Opp. at 5.
[8] *Tribune Co. & Its Licensee Subsidiaries*, Order, 27 FCC Rcd. 14239, 14241 (Nov. 16, 2012) ("Tribune Order"); *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, Order, 26 FCC Rcd. 4238, 4247-48 (Jan. 20, 2011) ("Comcast-NBCU Order").
[9] In its review of the Comcast-NBCU merger, the Commission spent roughly six pages discussing potential rule violations, and almost one hundred pages discussing the potential public interest harms and benefits of the transaction. *See* Comcast-NBCU Order, 26 FCC Rcd. at 4238 (rule violations discussed on pages 4343-4349, harms and benefits discussed on pages 4250-4343).
[10] *Id.* at 4337-38.
[11] *Id.* at 4333-34.

information from diverse and antagonistic sources is essential to the welfare of the public."[12] Competition "provides an incentive to television stations to invest in better programming and to provide programming that is preferred by viewers."[13] Localism "require[s] that broadcasters air material that is responsive to the needs and interests of the communities that their stations serve, including local news, information, and public affairs programming."[14]

The facts set forth in the twelve Declarations attached to the Petition describe in detail the likely harms to diversity, competition, and localism in each contested market. The alleged harm is as specific and concrete as possible, given that the acquisitions have not yet taken place and that Gannett, Sander, and Tucker have not made clear their future plans.

For example, Declarants residing in Phoenix describe how Gannett's expansion would reduce diversity and harm their communities. David W. Ragan, a Minister of United Church of Christ in Phoenix, AZ, explained that

> it is almost impossible to get media coverage of our events when our cause is against the positions taken by the dominant perspectives of the press and the community it shapes. Gannett's control over perspectives is already dangerous and this proposed action would destroy what little chance currently exists for all voices to be heard so that the public is fairly and justly informed.

Free Press member Traci Morris explains that "Phoenix has one of the highest urban American Indian populations in the country" and that KTVK, KPNX, and KASW "are viewable in many of the tribal communities in the state, yet our stories are not covered."

Tucson resident and Free Press member Mark Volner alleges that "Gannett's ownership of the *Arizona Daily Star*, as well as its intention to provide substantive services to KTTU and

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[12] Comcast-NBCU Order, 26 FCC Rcd. at 4316.
[13] *2006 Quadrennial Regulatory Review*, Report and Order on Reconsideration, 23 FCC Rcd. 2010, 2055, ¶ 97 (Feb. 4, 2008) ("2006 QR Order"), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.pdf; *Prometheus Radio Project v. FCC*, 652 F.3d 431, 459 (3d Cir. 2011).
[14] Comcast-NBCU Order, 26 FCC Rcd. at 4320.

KMSB, harms me by sharply reducing the number of independent voices and competitive news sources available to me." Similarly, Erich Vieth, a Free Press member from St. Louis, Missouri, explained that "[c]onsolidating the ownership of [KMOV and KSDK] would destroy much of what is left of competition in the St. Louis TV news rooms, hurting the St. Louis community."

Free Press member Ruth Newman, who resides in Louisville, described how after Gannett acquired the *Courier-Journal* in 1986, it "downsized reporting staffs across its fleet of papers" and "closed their Hazard bureau in eastern KY, which was the main source of news about the region's coal-mining industry." In her view, allowing Gannett to influence WHAS-TV (which it would operate through service agreements) would decrease local service and coverage yet again.

Some Declarants allege harm resulting from the inevitable reduction in workforce that will result from the shared service agreements. Kathleen McCarthy, a member of NABET-CWA residing in Portland, OR, specifically highlighted her concern that "if [these companies] combined or share services that could mean local job loss to our community." Traci Morris alleges that in Phoenix, where Gannett already owns the only daily newspaper and a network affiliate television station, Gannett has been

> hiring reporters that are younger and younger with no experience and paying reporters as contractors not career reporters, instead of paying for their journalistic experience. All this while we have one of the top journalism schools in the country down the street at Arizona State University (Cronkite School).

A recent survey has shown that station employment cutbacks have resulted in lower quality newscasts.[15]

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[15] PEW RESEARCH CENTER, 2013 STATE OF THE NEWS MEDIA 5, http://stateofthemedia.org/2013/overview-5 ("Nearly a third of U.S. adults, 31%, have stopped turning to a news outlet because it no longer provided them with the news they were accustomed to getting. . . . With reporting resources cut to the bone and fewer specialized beats, journalists' level of expertise in any one area and the ability to go deep into a story are compromised.").

Gannett asserts that the likelihood that the assignments "will affect present levels of employment at Belo stations is speculative and not relevant to the Bureau's evaluation of the Transaction."[16] It is virtually certain, however, that approval of this transaction will result in layoffs. Gannett's stated purpose in entering into the sharing agreements is to achieve economies of scale, which are quite often achieved by a reduction in workforce.[17] Furthermore, Tucker and Sander are obligated to maintain only one managerial employee at each station.[18] Thus, it is highly likely that the assignments will lead to staffing reductions.[19]

The public interest determination can, and in this case should, include an analysis of likely effect on employment because it is directly relevant to the quality of service the stations will provide to the public. Gannett misrepresents the two cases it cites in support of its argument to the contrary. In *Nat'l Ass'n of Broad. Emp. & Technicians*, NABET challenged an FCC decision to grant a license assignment, basing that challenge on the "bare allegation that the transfer of the license will have an adverse economic impact on six employees of the assignor."[20] The court, in upholding the FCC's decision to grant the license assignment, added that

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[16] Gannett Opp. at 8 n.18.

[17] *See, e.g.*, P.J. Bednarski, *Belo Turning over KMSB, KTTU to KOLD*, TV NEWS CHECK (Nov. 15, 2011), http://www.tvnewscheck.com/article/55453/belo-turning-over-kmsb-kttu-to-kold; Camilla Mortensen, *Joseph Calbreath speaks out on KMTR "blood bath,"* EUGENE WEEKLY (June 7, 2013), http://www.eugeneweekly.com/blog/joseph-calbreath-speaks-out-kmtr-blood-bath.

[18] *E.g.*, Application for Consent to Assignment of Broadcast Station Construction Permit or License of KGW, File No. BALCDT - 20130619AFN (June 19, 2013), Attachment 13, Asset Purchase Agreement ("Portland Asset Purchase Agreement"), Exhibit B-2 ("Portland JSA"), Section 3.1.

[19] Gannett has already engaged in substantial layoffs, and even worse, its own newspapers have not report on those layoffs. Anna Clark, *Does Gannett Think Its Own Papers Matter?*, COLUM. J. REV. (Aug. 16, 2013), http://www.cjr.org/united_states_project/does_gannett_think_its_own_papers_matter.php.

[20] *Nat'l Ass'n of Broad. Emp. & Technicians, AFL-CIO v. FCC*, 346 F.2d 839, 841 (D.C. Cir. 1965).

> we do not hold that the Commission lacks power to take labor relations matters into account as one of the factors in the totality of considerations in passing upon a license assignment application. If further allegations connect the impact on the employees with at least potentially substantial adverse effects upon the service being supplied the public by the licensed activity, we assume the Commission may protect that broader interest, of which it is the duly constituted guardian, by conditioning its consent in such manner as is likely to protect the public interest.[21]

Gannett also cites *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC* in support of its argument, but the case is inapposite. In *Bilingual*, the court found that the Commission's long-standing recognition that the public is not served by licensees who engage in job discrimination does not charge the Commission "with a mandate to enforce antidiscrimination laws" (which are outside the FCC's purview) in a license renewal proceeding.[22] Thus, these cases do not preclude the FCC from including the impact on employment in its public interest analysis in the license assignments at-issue.

B. The Applicants Have Failed to Show that Approval Would Serve the Public Interest

Applicants make no serious effort to rebut Petitioners' prima facie showing of public interest harm, and do not meet the burden of showing by a preponderance of the evidence that the assignment, on balance, serves the public interest.[23] Rather, Applicants' purported public interest benefits are scant, unpersuasive, and unsubstantiated.

Gannett generally claims the transaction "will allow Gannett to achieve economies of scale and employ infrastructure that will support its mission of local public service and its strong commitment to local journalism across all of the communities that its stations serve."[24] Gannett

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[21] *Id.*
[22] *Bilingual Bicultural Coal. on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628 (D.C. Cir. 1978).
[23] SBC Order, 20 FCC Rcd. at 18300; Comcast AT&T Order, 17 FCC Rcd. at 23255.
[24] Gannett Opp. at 3-4.

wholly fails to substantiate these claims, as required by the Commission.[25] In fact, there is evidence that economies of scale do not result from such a merger: multiple companies that once owned newspapers and TV stations have spun-off their newspaper divisions.[26]

Gannett suggests that permitting these acquisitions will help Gannett compete in the face of "increased competition from companies operating across a wide range of media platforms, including an ever-expanding array of Internet and mobile services."[27] This assertion places focus on the wrong market. The relevant market for assessing the public interest impact in this case is limited to outlets that provide local programming and local news.[28] By Gannett's own admission, "most [of the Internet and mobile competitors] do not provide any local news, weather, emergency information, or other localized services to the public," while Gannett "places intense emphasis on its local broadcast journalism."[29] Thus, while it is debatable whether approval of these assignments would help Gannett's stations become more competitive more broadly, approval would lead to a reduction in competition in local news by, in some markets, eliminating

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[25] *See* Comcast-NBCU Order, 26 FCC Rcd. at 4337-38. In that case, the Commission found claims of economies of scale (with respect to programming and advertising) unsubstantiated because applicant did not *show* how economies of scale would lead to increased programming rather than reduced number of voices. It also did not show how shared resources regarding advertising would benefit the *public*. Id. at 4338.

[26] Ben Elsen, *Tribune Co. Proposes to Spin Off Newspapers*, FOX BUS. (July 10, 2013), http://www.foxbusiness.com/markets/2013/07/10/tribune-co-proposes-to-spin-off-newspapers; *Planned News Corp Spin-Off Lost $2B in Fiscal 2012*, ASSOC. PRESS (Dec. 21, 2012), http://bigstory.ap.org/article/planned-news-corp-spin-lost-2b-fiscal-2012; Jennifer Saba & Ben Berkowitz, *Warren Buffett to Buy Media General Newspapers*, REUTERS (May 17, 2012), http://www.reuters.com/article/2012/05/17/us-mediageneral-idUSBRE84G0M920120517.

[27] Gannett Opp. at 3.

[28] *See, e.g.*, 2006 QR Order at 2038, ¶ 46 ("A case-by-case approach will enable the Commission to make a more fully informed assessment that a proposed transaction in a particular market actually will increase the total amount of local news generated by the combined outlets.").

[29] Gannett Opp. at 3.

a competitor and independent voice (Belo), which Gannett acknowledges "has been recognized for its longstanding commitment to public service and journalism."[30]

Gannett admits that if the assignments were approved, it would provide up to 15% of local programming (twenty-five hours) to Sander's stations in Portland and Louisville, where Gannett already owns a daily newspaper.[31] This means that Gannett will likely provide all local news programming for Sander's Portland and Louisville stations.[32] It appears (and Gannett does not deny) that the Gannett sharing agreements, like those that came before it, are targeted at minimizing all original local news programming at these stations, only to replace it with content from its other newspaper and broadcast assets.[33] This result is inconsistent with the purpose of the NBCO rule to maximize diversity in local news, and clearly contravenes the public interest.

In addition, the proposed JSAs for Louisville and Portland *require* that Sander retain Gannett on an "exclusive basis to market and sell all forms of regional and local spot advertising (including political advertising), sponsorships, direct response advertising, paid programming (including infomercials), and all long-form advertising broadcast on the Station."[34] This means Gannett controls not only the advertising that occurs during the local news it provides, but also the advertising on any non-Gannett provided programming. They will work in conjunction, not as competitors.

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[30] *Id*.
[31] *Id.* at 6.
[32] As of 2011, the median number of hours devoted to local news by broadcast stations was five hours per weekday. PEW RESEARCH CENTER, 2013 STATE OF THE NEWS MEDIA 5, http://stateofthemedia.org/2013/local-tv-audience-declines-as-revenue-bounces-back.
[33] *See, e.g.*, P.J. Bednarski, *Belo Turning over KMSB, KTTU to KOLD*, TV NEWS CHECK (Nov. 15, 2011), http://www.tvnewscheck.com/article/55453/belo-turning-over-kmsb-kttu-to-kold; Camilla Mortensen, *Joseph Calbreath Speaks out on KMTR "Blood Bath,"* EUGENE WEEKLY (June 7, 2013), http://www.eugeneweekly.com/blog/joseph-calbreath-speaks-out-kmtr-blood-bath.
[34] Portland JSA at ¶ 4.1.

In Phoenix and St. Louis, where Gannett owns television stations, Gannett emphasizes that the SSAs do not provide for Gannett to supply any programming.[35] However, as shown in the Petition to Deny, each of these markets has specific characteristics that make these assignments contrary to the public interest. In Phoenix, Gannett already is the largest provider of local news in the market because of a waiver permitting its ownership of KPNX, the NBC affiliate, as well as the market's only daily newspaper.[36] In St. Louis, Gannett already owns the NBC affiliate KSDK.[37] KSDK in turn provides local news to KDNL, the ABC affiliate.[38] The license assignments at issue anticipate Gannett assuming certain operational control over KMOV, the CBS affiliate, while Sander would technically hold the license. Accordingly, if these applications are approved, Gannett will have significant control over the ABC, CBS, *and* NBC affiliates in St. Louis.

In Tucson, Gannett is correct that the agreements do not contemplate that Gannett will supply any programming to either the Sander or Tucker stations. However, Petitioners' main concern in Tucson is that the market currently has only six independent television voices.[39] Belo's sale of two stations (KMSB and KTTU) to separate entities (Sanders and Tucker) offers the potential for increased diversity in local news, but instead, the agreements contemplate that Raycom station KOLD will continue to provide services (including local news) to both KMSB

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[35] Gannett Opp. at 5.
[36] Petitioners strongly disagree with Gannett's characterization that the pending petition for reconsideration of the waiver is "procedurally infirm." Gannett Opp. at 10 n.25. If it were, the FCC surely would have dismissed it long ago, which it did not.
[37] Petition to Deny at 31-32.
[38] Lisa Brown, *KSDK to Produce Newscasts for KDNL*, ST. LOUIS TODAY (Nov. 13, 2010), http://www.stltoday.com/business/ksdk-to-produce-newscasts-for-kdnl/article_2e5d4a71-38ce-5d1a-933f-659ce0af54ce.html.
[39] Pet. to Deny, at 23.

and KTTU.[40] Thus, the shared services agreement between Raycom, KMSB and KTTU is an integral part of the assignment of licenses and must be considered as part of the Commission's public interest analysis.

C. Belo's Claim that Petitioners Lack Standing is Without Merit

Having failed to demonstrate that approval of these assignments would be in the public interest, Belo alleges that Petitioners lack standing because they failed to establish injury-in-fact, causation, and redressability.[41] These arguments are meritless.

As discussed above in Part I.A, Petitioners have demonstrated injury-in-fact in declarations from their respective members in each of the affected markets and viewers of each affected station. The declarations make specific allegations of harm that would result from approving the assignments. This showing satisfies the standing requirements set forth in Section 309(d)(1) of the Communications Act of 1934, as well as Belo's primary case support, *Rainbow/PUSH*.[42]

Rainbow/PUSH explicitly recognized that "audience members may have standing to challenge a decision of the Commission because they may bring to the Commission's attention matters relating to a broadcaster's programming."[43] It denied standing to Rainbow/Push because its two supporting declarations "merely identif[ied] rather than document[ed] two potential types of injury."[44] By contrast, Petitioners' twelve declarations specifically document how programming will be affected and the public will be harmed if the assignments are approved.

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[40] Id. at 27.
[41] Opp'n of Belo Corp. to Pet. Den., *Application for Consent to Assignment of Broadcast Station licenses from Belo Corp. et al.*, MB Docket No. 13-189 (Aug. 8, 2013) ("Belo Opp."), 9-10.
[42] *See* Belo Opp. at 10.
[43] *Rainbow/PUSH Coal. v. FCC*, 330 F.3d 539, 544 (D.C. Cir. 2003) ("*Rainbow/PUSH"*).
[44] *Id.*

Standing is not negated simply because, as Belo alleges, Applicants could pursue similar sharing agreements outside of the context of a license proceeding.[45] Petitioners here seek relief from specific harms that are part and parcel of the proposed assignments and that can be redressed through the Commission's denial of the assignments. Moreover, the Media Bureau has explicitly stated that licensing proceedings are a proper venue for challenging shared services agreements.[46] The effect of denying standing here would be to make such agreements unreviewable.[47] Finally, if the Commission finds that the assignments are contrary to the public interest because of the sharing arrangements, Applicants would not be free to pursue such agreements outside of the licensing proceeding.

II. THE FCC HAS THE RESPONSIBILITY TO ADDRESS THE PUBLIC INTEREST CLAIMS BY PETITIONERS AND IS NOT LIMITED TO ADDRESSING THEM IN A RULEMAKING

Gannett and Belo accuse Petitioners of improperly seeking a rule change through adjudication rather than through a rulemaking.[48] In reality, it is Gannett and Belo that are attempting to change FCC rules with which that they do not agree.

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[45] Belo Opp. at 11.

[46] *See KHNL/KGMB License Subsidiary, LLC,* Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd. 16087 (2011) at ¶ 23 ("MCH"). In *MCH*, petitioners challenged certain shared service agreements in Honolulu outside the licensing process. While the Bureau stated that the "net effect" of "an extensive exchange of critical programming and branding assets" was "clearly at odds with the purpose and intent of the duopoly rule," it did not enforce the local TV ownership rule for lack of pending license application. The Bureau did note that its decision "does not preclude us from considering whether this or similar transactions are consistent with the public interest within the context of individual licensing proceedings." *Id.*

[47] Assuming for purposes of argument that Petitioners failed to satisfy the requirement for Article III standing, the Commission has explicitly held that the "administrative standard for broadcast standing is less stringent than the judicial standard applied to petitioners appealing Commission decisions in federal court." *Sagittarius Broad. Corp.*, 18 FCC Rcd 22551, 22553-54, n.20 (2003).

[48] Gannett Opp. at 9-10; Belo Opp. at 7-9.

In the 2006 Quadrennial Review ("2006 QR"), Gannett sought to eliminate the television duopoly rule and Belo sought to relax it.[49] Nonetheless, the Commission was "persuaded from the evidence in the record that the current [local TV] rule is consistent with the public interest."[50] It explained that the rule promotes competition for viewers and advertisers within local television markets and that competition "provides an incentive to television stations to invest in better programming and to provide programming that is preferred by viewers. The local community benefits from competition among broadcast television stations in the form of higher quality programming provided to viewers."[51] In particular, the Commission reaffirmed the need for the top-four limitation because allowing mergers between top-four ranked stations would result in a single firm obtaining a disproportionately large market share compared to competitors and would reduce incentives for local stations to improve programming that appeals to mass audiences.[52] In the 2010 Quadrennial Review NPRM ("2010 QR NPRM"), the Commission made a tentative conclusion to retain the top-four limitation for the reasons stated in the 2006 QR Order.[53] It also proposed to retain the eight voices test.[54] It noted that television stations continued to face little competition in provision of local programming.[55]

Similarly, Gannett and Belo sought repeal or relaxation of the NBCO rule in the 2006 QR. The Commission concluded, however, "that some limitations on newspaper/broadcast cross-

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[49] 2006 QR Order, 23 FCC Rcd 2010 at 2021, ¶ 19 & n.68.
[50] *Id.* at ¶ 96.
[51] *Id.* at ¶ 97. The FCC's conclusion withstood judicial review. *See Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011).
[52] 2006 QR Order, 23 FCC Rcd. at ¶ 97 (citing *2002 Biennial Review Order*, 18 FCC Rcd 13620, 13695, ¶ 194 (2003)).
[53] *2010 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, ¶ 200 (2011) ("2010 QR NPRM") at ¶ 40.
[54] *Id.* at ¶¶ 46-47.
[55] *Id.* at ¶ 33.

ownership continued to be necessary to promote viewpoint diversity."[56] In the 2010 QR NPRM, the Commission determined that "[g]iven the continuing prevalence of broadcast stations and newspapers as news sources consumers rely on the most, we tentatively find that some newspaper/broadcast restrictions remain necessary to protect viewpoint diversity."[57]

Having failed to convince the Commission to repeal or relax the local ownership rules, in such a way that would allow Belo to assign its stations directly to Gannett without sharing agreements, Applicants propose to enter into agreements that result in the same harms as outright ownership. The Commission should not allow broadcasters to make an end-run around its rules in this manner.

The Commission need not conduct a rulemaking to prevent sharing arrangements designed to circumvent local ownership rules. It is a fundamental principle of administrative law that agencies may make policy by either adjudication or rulemaking.[58] Applicants argue that a "rulemaking is generally a 'better, fairer, and more effective method' of implementing a new industry-wide policy,"[59] citing language from *Community Television of Southern California v. Gottfried*[60] and *California Ass'n of the Physically Handicapped, Inc. v. FCC.*[61] Applicants then proceed to make the leap in logic that this means "rulemaking is the *only* appropriate context" for this case.[62] The cited language, however, does not prohibit the FCC from adopting a new policy

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[56] *Id.* at ¶ 84.
[57] *Id.* at ¶ 97.
[58] *See* RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 407, 509-10 (5th ed. 2010); *e.g.*, Hatch v. Fed. Energy Regulatory Comm'n, 654 F.2d 825, 834 (D.C. Cir. 1981) (citing *Am. Trucking Ass'n v. Atchison, Topeka & Santa Fe Ry*., 387 U.S. 397, 416 (1967)) ("As a general matter, an agency is free to alter its past rulings and practices even in an adjudicatory setting." (citations omitted)); *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009).
[59] Gannett Opp. at 10; Belo Opp. at 7.
[60] 459 U.S. 498, 511 (1983).
[61] 840 F.2d 88, 96-97 (D.C. Cir. 1988).
[62] Gannett Opp. at 10 (emphasis added).

in a licensing decision.[63] The FCC routinely uses adjudications to establish policy in a variety of contexts. For example, in *FCC v. Fox Television Stations, Inc.,* the Supreme Court found that the FCC's broad policy changes announced in adjudications were consistent with the Administrative Procedures Act. [64] It is not unusual for the FCC to announce broad policies through the issuance of declaratory rulings rather than rulemakings, which have been consistently upheld by courts.[65]

In this case, rulemakings have not provided a better, fairer, or more effective means to establish policy. In 2004, the Commission initiated a rulemaking in which it tentatively concluded that it should adopt attribution rules for television JSAs similar that it adopted for radio.[66] But no decision has ever issued in that proceeding.[67] In the 2010 QR NPRM, the Commission sought comment on whether sharing arrangements should be attributed. Specifically, it asked "Are LNS agreements and SSAs substantively equivalent to agreements

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[63] In any event, the cases are factually distinct. In *Gottfried* and *California Ass'n*, organizations representing deaf viewers sought to use the licensing renewal process to impose captioning requirements and to prevent job discrimination on the basis of disability, respectively. *See Cmty. Television of S. California v. Gottfried*, 459 U.S. 498, 501 (1983); *California Ass'n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88, 90 (D.C. Cir. 1988).These cases were prior to the passage of the Telecommunications Act of 1996, which gave the FCC authority to require closed captioning. Nor did the FCC have any responsibility for enforcing laws governing employment. Thus, it made sense that the FCC should engage in a rulemaking if it wished to impose entirely new obligations on licenses. By contrast, in this case the FCC has long been concerned about program diversity, ensuring adequate sources of local news, and promoting competition in local markets.

[64] 556 U.S. 502, 520 (2009) ("[T]he agency's decision to consider the patent offensiveness of isolated expletives on a case-by-case basis is not arbitrary or capricious.").

[65] *See, e.g., NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 1002 (2005) (upholding FCC's declaratory ruling that cable companies providing broadband Internet access did not provide a telecommunications service under the Telecommunications Act of 1996); *Qwest Servs. Corp. v. FCC*, 509 F3d 531, 536 (D.C. Cir. 2007) ("[Petitioner] also argues that such a broadly applicable order as in fact came forth—determining the classification of all IP-transport and menu-driven cards—can only take the form of a rule, and thus must be prospective only. There is no such general principle."); *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001) (an agency has "very broad discretion whether to proceed by way of adjudication or rulemaking").

[66] *2004 TV JSA Attribution NPRM*, 19 FCC Rcd 15238, 15239, ¶ 2.

[67] 2010 QR NPRM, 26 FCC Rcd at ¶ 197.

that are already subject to our attribution rules, and are they therefore attributable today or should they be attributable?"[68] The form of this question indicates that such agreements already should be attributed. While the FCC may ultimately decide to attribute sharing arrangements in the 2010 QR, that possibility does not obviate the need for the FCC to address the public interest questions raised by the sharing agreements in this transaction.

CONCLUSION

For the foregoing reasons, the Commission should deny or designate for hearing the licenses at-issue in this case.

August 20, 2013

Respectfully Submitted,

/s/

Eric G. Null[*]
Angela J. Campbell
Institute for Public Representation
Georgetown Law
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

Counsel for Public Interest Petitioners

Matthew Wood
Andrew Jay Schwartzman
Lauren Wilson
Free Press
1025 Connecticut Ave. NW, Suite 1110
Washington, D.C. 20036
(202) 265-1490

[68] *Id.* at 17569.

[*] Admitted to the New York bar only; DC bar membership pending. Practice supervised by members of the DC bar.

CERTIFICATE OF SERVICE

I, Eric Null, hereby certify that copies of the Petition to Deny by Free Press, NABET-CWA, TNG-CWA, National Hispanic Media Coalition, Common Cause, and Office of Communication, Inc., of the United Church of Christ, through their attorneys, the Institute for Public Representation, have been served by first-class mail and courtesy copy by e-mail, this 20th of August, 2013, on the following persons at the addresses shown below.

Richard E. Wiley
James R. Bayes
Eve K. Reed
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
jbayes@wileyrein.com
Counsel for Belo Corp.

Adrienne Denysyk
Video Division, Media Bureau
Room 2-A820
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

John R. Feore, Jr.
Jason E. Rademacher
Dow Lohnes PLLC
1200 New Hampshire Avenue, NW, Suite 800
Washington, DC 20036
jfeore@dowlohnes.com
Counsel for Sander Operating Cos.,
Tucker Operating Co.

Best Copy and Printing, Inc.
Portals II
445 12th Street, SW
Room CY-B402
Washington, DC 20554

Kurt Wimmer
Jennifer Johnson
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
kwimmer@cov.com
Counsel for Gannett Co. Inc.

Tom Chauncey
Gust Rosenfeld P.L.C.
1 East Washington Street, Suite 1600
Phoenix, AZ 85004-2553
Counsel for Sander Operating Cos.

Respectfully Submitted,

/s/

August 20, 2013

Eric Null

Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535