

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.)
)

APPLICATION FOR REVIEW

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Table of Contents

Summary i

I. Questions Presented 1

II. Background 2

 A. The Increasing Use of Unlawful Sharing Arrangements to Evade Ownership Limits... 2

 B. Background on Gannett-Belo Transaction..... 6

III. The Full Commission Should Reverse the Gannett-Belo Decision and Media Bureau Precedent Related to Sharing Arrangements 9

 A. The Gannett-Belo Transaction Presents a Novel Question of Law, Fact and Policy Regarding Whether Sharing Arrangements Can Be Used to Evade the NBCO Rule 9

 B. The Bureau's Approval of the License Assignment Violates Section 310(d) of the Communications Act 10

 1. The Bureau Failed to Review the Cumulative Effect of the Transaction under the Public Interest Standard 11

 2. The Bureau Failed to Examine the Impact the Transaction Would Have on the Diversity of Sources for Local News 13

 3. The Bureau Failed to Address the Implications of the Department of Justice Findings of Undue Influence..... 14

 C. The Commission Should Reverse Bureau Precedent and Provide Guidance As to the Extent to Which Sharing Arrangements Are Consistent With the Public Interest 16

 1. Sharing Arrangements Raise an Issue of Broad Public Concern 16

 2. Sharing Arrangements Will Further Proliferate Without Commission Intervention 17

 3. Reversal Does Not Implicate Reliance Interests 18

Conclusion 18

Summary

The Media Bureau's decision to grant certain license assignments from Belo Corp. to Gannett Co. on December 20, 2013, should be overturned by the full Commission. This transaction involved multiple "Shared Service Agreements" and "Joint Sales Agreements" (collectively referred to as "sharing arrangements") in markets where outright ownership of the stations by Gannett would have run afoul of the Commission's media ownership rules—specifically, the newspaper-broadcast cross-ownership rule ("NBCO rule"). The sharing arrangements allow Gannett to acquire the stations, then assign the licenses to a third party "sidecar" company, Sander Company or Tucker Company, and still receive income from and provide services to the stations.

The Petition to Deny those license assignments, filed by Public Interest Petitioners, alleged that granting the assignments was not consistent with the public interest because, among other harms, the cumulative effect of the transaction was to reduce diversity of news sources in each market, undermining the purpose of the NBCO rule. Petitioners further argued that the full Commission should have heard this case because it presents a novel issue of law and fact: this was the first time that the Commission was presented with an assignment application proposing to evade the NBCO rule through the use of sharing arrangements.

The Bureau denied the Petition while failing to address the substantive public interest arguments put forth in the Petition. Instead, the Bureau assumed that because the transaction fit with staff-level Bureau precedent—that has never been reviewed by the full Commission—it was in the public interest. No discussion was provided regarding diversity of voices, or whether the cumulative effect of the transaction would undermine the purpose and intent of the NBCO rule. The Bureau did not refer the decision to the full Commission and did not explain why.

The Bureau's analysis of this transaction was flawed in many respects. Without discussion of the NBCO rule and its rationale, the Bureau cannot properly apply the public

interest standard. There are numerous reasons to believe that the transaction would be inconsistent with the public interest. The most obvious reason is that, in each of the markets with sharing arrangements, the market essentially has permanently lost an independent voice and competing provider of local news programming. The relevant DMAs have concentrated media markets as well: most have fewer than ten total voices (between daily newspapers and separately owned broadcast TV stations). Further, there is evidence indicating that these sharing arrangements harm the quality of local news in various markets. Studies show that stations sharing resources tend to focus on national (or at least non-local) stories. Also, as one would expect, stations that share resources are more likely to share reporters, photographers, stories, scripts, graphics, and video.

The Department of Justice raised concerns regarding the influence that Gannett would have over the sidecar companies, specifically Sander. The DOJ found that the terms and structure of the transaction provided Gannett a significant amount of influence over Sander. The DOJ made this determination by looking at the transaction overall, and examining incentives and likely effects. In the end, the DOJ required divestiture of the St. Louis Belo station, KMOV. The Bureau did not address any of the DOJ's conclusions or rationale, or whether the DOJ's decision affected the Bureau's broader determination of whether the assignments serve the public interest.

The Commission should overturn Bureau precedent regarding sharing arrangements crafted to circumvent its broadcast TV ownership rules and provide guidance on whether these sharing arrangements can be consistent with the public interest. Specifically, in making its judgment, the Commission should observe that sharing arrangements have become a matter of broad public concern, garnering skepticism even from Congress. Also, broadcasters will continue to exploit the sharing arrangement loophole so long as the full Commission remains silent. Further, the Commission can reverse these decisions without implicating any reliance interests.

Therefore, the Bureau's decision must be reversed, and precedent overturned.

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APPLICATION FOR REVIEW

NABET-CWA, TNG-CWA, National Hispanic Media Coalition, Common Cause, and Office of Communication, Inc., of the United Church of Christ, by their attorneys, the Institute for Public Representation, along with Free Press, pursuant to 47 C.F.R. § 1.115, seek full Commission review of the Media Bureau’s decision in *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc.*, Memorandum and Order, MB Docket No. 13-189, Dec. 20, 2013 (the "*Decision*"). The *Decision* should be overturned because (1) the approval of the assignments involving sharing arrangements to evade the NBCO rule presents a novel question of law, fact, and policy that should be decided by the full Commission; (2) the Bureau’s decision was incorrect because the assignment of licenses is contrary to Section 310(d) of the Communications Act, which permits assignments only where they serve the public interest; and (3) failure to reverse this decision and the previously unreviewed Bureau precedents on which it relies will result in even greater evasion of media ownership rules through sharing arrangements.

I. Questions Presented

1. Does this case present a novel issue of law, fact, and policy because it is the first case to decide whether the newspaper-broadcast cross-ownership rule may legally be circumvented by a sharing arrangement?

2. Were the license assignments in the Gannett-Belo Order contrary to Section 310(d) of the Communications Act because they are not consistent with the public interest?

3. Should the full Commission overturn Media Bureau precedent regarding sharing arrangements because it is not consistent with the public interest?

II. Background

A. The Increasing Use of Unlawful Sharing Arrangements to Evade Ownership Limits

This case addresses the Media Bureau’s policies authorizing various “sharing arrangements” which have been designed to evade the Commission’s ownership rules. In these transactions, the buyer, which would otherwise be prohibited from owning a station, gains effective control of that station by allowing another company (a “sidecar”) to hold the license. In reality, the buyer operates the station, however, and the sidecar company cedes effective control to the buyer, typically receiving a fee or a portion of advertising revenues for doing so.

The full Commission has addressed attribution and modern sharing arrangements on only one occasion. In *Ackerley Group, Inc.*, the Commission reversed the Bureau’s decision to allow a “Time Brokerage Agreement” (“TBA”) between Seal Rock and Ackerley. The TBA in that case allowed Ackerley to provide Seal Rock, the putative licensee, with up to 15% of the station’s programming and Ackerley would keep all advertising and programming revenue. The Commission said this was the “‘substantive[] equivalent’ to an LMA for more than 15% of KCBA(TV)’s weekly broadcast hours.”¹ Thus, in *Ackerley*, the Commission looked beyond any single contract provision and instead considered the cumulative effect of multiple provisions to determine whether Ackerley had an attributable interest in the station.

¹ *Shareholders of the Ackerley Group, Inc (Transferor) and Clear Channel Communications, Inc. (Transferee) For Transfer of Control of the Ackerley Group, Inc., and Certain Subsidiaries*, Memorandum Opinion and Order, 17 FCC Rcd 10828, 10841 (2002).

Since *Ackerley*, sharing arrangements of many different types have proliferated under the Media Bureau's practice of freely authorizing them when presented, even when challenges are filed, and despite the fact that the Commission has never affirmed or authorized such policies. We know of no instance in which the Bureau denied an application because of public interest concerns about the arrangements, even when a petition to deny had been filed.²

In many cases where the Bureau denied the petitions, parties filed applications for review. Although these applications for review have been pending for several years (and in at least one case, nine years), the full Commission has never acted on any of them. For example, in January 2005, a competing television station filed an application for review of the Bureau's decision in *Malara Broadcast Group*.³ The application challenged the approval of a transfer involving a sharing arrangement that permitted "consolidation of the CBS and NBC affiliate television stations in the four-station Duluth market."⁴ The application specifically pointed out that the "agreements evidence an intention to circumvent the Commission's rules by creating a duopoly relationship which is not permitted."⁵ Further, the application claimed the Bureau failed

² One decision conditioned a grant because agreement was too intrusive on other station's discretion in programming: *CFM Communications, LLC*, Letter, 20 FCC Rcd 9738 (MB 2005), *grant rescinded on other grounds*, 20 FCC Rcd 10824 (MB 2005), requiring that (1) parties alter language that required CFM to fill the 85% of its broadcast time that it programs with paid or bartered programming; (2) the requirement that CFM consult with Pappas on selection of programming be removed; and (3) lease of facilities agreements must give CFM a minimum of 12-months' notice before terminating or failing to renew lease of broadcast(-related) facilities.

³ *Malara Broadcast Group of Duluth Licensee, LLC*, Letter, 19 FCC Rcd 24070 (MB 2004) [hereinafter *Malara Decision*].

⁴ *Malara Broadcast Group of Duluth Licensee, LLC*, Application for Review at 9 (filed Jan. 13, 2005).

⁵ *Id.* Similarly, a competing station filed an application for review of the Bureau's decision in *Piedmont Television of Springfield Licensee, LLC*, Letter, 22 FCC Rcd 13910 (MB 2007) [hereinafter *Piedmont Decision*]. That application contended that the assignee, which was run by a former employee of another station in the market, was a shell, and was designed to give the station "'a virtual duopoly' comprising the ABC and NBC network affiliates in Springfield, [MO], two of the top four stations in the market." *Piedmont Television of Springfield Licensee, LLC*, Application for Review at iii (filed Aug. 29, 2007). It further argued that the Bureau's

to discuss many facts raised by the petitioners in that case, including “that Granite [the purchaser] shall produce the local news broadcasts for both KBJR and KDLH, and supply news programming to several local radio stations, five regional newspapers, including the dominant local daily newspaper, [and] jointly sell the local advertising of KBJR, KDLH, and for the local UPN broadcast service.”⁶ In response, and contrary to the *Ackerley* approach, the Bureau very quickly began allowing these arrangements to evade ownership limits by reviewing the transactions without regard for their cumulative effect.

In 2009, Media Council Hawai`i filed an emergency petition asking the Commission to prevent stations in Honolulu from executing agreements that would allow one broadcaster to operate three stations in Honolulu, including two major network affiliates.⁷ The Bureau acknowledged that the transaction undermined the public interest: “the net effect of the transactions in this case – an extensive exchange of critical programming and branding assets with an existing in-market, top-four, network affiliate – is clearly at odds with the purpose and intent of the duopoly rule.”⁸ The Bureau, however, found that it was unable to do anything at the time because the agreements were not made as part of a license transfer proceeding.⁹ Media Council Hawai`i filed an application for review in December 2011, which is still pending.

The cumulative effect of these and other Bureau decisions was to create, essentially, a staff-generated roadmap—never examined by the full Commission—for how stations, that in

decision completely eviscerated the local television ownership rule and that “taken to its logical conclusion the [Bureau decision] would support the combination of three, four or more television stations within the same market so long as the legalist forms of agreements were observed, at least on paper.” *Piedmont* Application for Review at 3.

⁶ *Malara* Application for Review, *supra* note 4, at 10.

⁷ *KHNL/KGMB License Subsidiary, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 16087, 16095 (MB 2011) [hereinafter *Hawai`i Decision*].

⁸ *Id.*

⁹ *Id.* (“[O]ur decision here does not preclude us from considering whether this or similar transactions are consistent with the public interest within the context of individual licensing proceedings.”).

name are separately owned, can work together. Briefly, the Bureau's "case law" establishes that the Bureau will approve such arrangements so long as the sidecar licensee of the relevant stations remains contractually responsible for decisions about programming, finances, and personnel.¹⁰ Such control is nominal, however, because the sidecar, for example, need only furnish one managerial employee;¹¹ may allow another station to provide up to 15% of its programming (typically all of the sidecar station's local news);¹² need not produce any programming on its own; may completely merge its operations with one or more stations in the same market;¹³ is permitted to have another station sell all of its local spot advertising time;¹⁴ and can allow the other owner to bear most of the financial risks and obtain most of the rewards.¹⁵

Sharing arrangements have been widely used to evade the Commission's local TV rule. Indeed, neither the Commission nor the public know the full extent of these agreements because parties typically do not disclose them.¹⁶ Based on the most recent data compiled by Free Press, at

¹⁰ E.g., *Hawai'i Decision*, *supra* note 7, at 16092.

¹¹ E.g., *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc.*, Memorandum Opinion and Order, MB Docket No. 13-189 (Dec. 20, 2013) [hereinafter *Decision*] (the "one employee" requirement was first allowed in the *Decision*. The last Bureau order regarding sharing arrangements, the *Hawai'i Decision*, interpreted "meaningful staff presence" under the main studio rule to allow a sharing arrangement with *two* employees, 26 FCC Rcd at 16094).

¹² E.g., *Hawai'i Decision*, *supra* note 7, at 16091; *Piedmont Decision*, *supra* note 5, at 13910; *Malara Decision*, *supra* note 3, at 24070.

¹³ E.g., *Hawai'i Decision*, *supra* note 7, at 16089 n.10; *SagamoreHill of Corpus Christi Licenses, LLC*, Letter, 25 FCC Rcd 2809, 2814 (MB 2010) [hereinafter *SagamoreHill Decision*]; *Nexstar Broadcasting, Inc.*, Letter, 23 FCC Rcd 3528, 3533 (Vid. Div. 2008) ("[A] licensee may delegate day-to-day operations without surrendering *de facto* control.") [hereinafter *Nexstar Decision*].

¹⁴ E.g., *Hawai'i Decision*, *supra* note 7, at 16089; *Nexstar Decision*, *supra* note 13, at 3538-39.

¹⁵ E.g., *Hawai'i Decision*, *supra* note 7.

¹⁶ The FCC recently declined to require broadcasters to upload sharing arrangement contracts to their online public file. *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Second Report and Order, 27 FCC Rcd 4535, 4574 (2012).

least 103 out of 210 DMAs have two or more stations with sharing arrangements.¹⁷ This is a significant jump from only two years prior, when another report concluded that 83 markets had sharing arrangements.¹⁸

In particular, 2013 was a blockbuster year for media consolidation and sharing arrangements. In that year, media companies spent over \$11 billion to acquire other media companies,¹⁹ and nearly 300 TV stations changed hands.²⁰ The Gannett-Belo transaction is part of a wave of major media mergers involving sharing arrangements; others include Tribune's acquisition of Local TV,²¹ Sinclair's acquisition of Fisher, and Sinclair's pending acquisition of Allbritton. Most 2013 acquisitions included multiple sharing arrangements.

B. Background on Gannett-Belo Transaction

In June 2013, Gannett Co. and Belo Corp. entered into an agreement under which Gannett would purchase all of Belo's twenty TV stations. Because outright acquisition of stations in five markets would have violated the Commission's local TV or NBCO rule, Gannett entered into various sharing arrangements (including Shared Service Agreements and Joint Sales Agreements) with sidecar companies Sander Co. and Tucker Co. These sharing arrangements allowed Gannett to provide to Sander and Tucker, among other services, programming, sale of

¹⁷ *Notice of Ex Parte*, Free Press, MB Docket 09-182 (Dec. 5, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7520960755>. DIRECTV claimed there are 93 markets DMAs with multiple ownership. *Notice of Ex Parte*, DIRECTV, MB Docket 09-182 (Dec. 6, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7520961127>.

¹⁸ DANILO YANICH, LOCAL TV NEWS & SERVICE AGREEMENTS: A CRITICAL LOOK (Oct. 2011), available at <http://www.udel.edu/ocm/pdf/DYanichSSAFINALReport-102411.pdf>.

¹⁹ Volker Moerbitz, *Broadcast Deal Market December: A Dynamic End to a Dynamic Year*, SNL KAGAN, January 13, 2014.

²⁰ *Nearly 300 TV Stations Sold in 2013*, TVNEWSCHECK (Jan. 21, 2014), <http://www.tvnewscheck.com/article/73452/nearly-300-tv-stations-sold-in-2013>.

²¹ Free Press also challenged the application in the Tribune-Local TV case. *Application for Consent to Assignment of Broadcast Station Licenses from Local TV, LLC to Dreamcatcher Broadcasting, LLC*, Petition to Deny, MB Docket 13-190 (Aug. 19, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7520938730>.

advertising, back-office support, and shared office space, and gave Gannett the option to purchase the stations and sidecar companies should the Commission relax its ownership rules.

NABET-CWA, TNG-CWA, National Hispanic Media Coalition, Common Cause, Free Press, and Office of Communication, Inc., of the United Church of Christ filed a Petition to Deny the license assignments.²² The Petition argued that the license assignments must be denied because they were inconsistent with the public interest and undermined the purpose of the media ownership rules: they reduced diversity of voices in all markets and reduced competition for advertising and local news. In addition, Petitioners argued that, because a sharing arrangement had never before been used to evade the NBCO rule, the case presented novel issues of law and fact. Thus, the Bureau lacked delegated authority to hear the case under 47 C.F.R. § 0.283(c).

The Department of Justice (“DOJ”) reviewed the merger in December 2013. Finding that Gannett’s control of the market for advertising spot sales in St. Louis, MO, would violate antitrust law, the DOJ filed a complaint seeking to bar the transaction. At the same time, it entered into a settlement with Gannett and Sander requiring divestiture of the Belo station (soon-to-be Sander station) KMOV. In coming to that conclusion, the DOJ noted that, “[t]aken together, [the agreements between Gannett and Sander] are likely to give Gannett significant influence over Sander.”²³ The DOJ’s narrow focus on the economic effect of advertising sales did not lead it to conclude that the Gannett-Sander relationship should be barred in other markets, most of which involved newspaper-television combinations that do not compete in the advertising spot market. The DOJ’s legal determination that the transaction gave Gannett

²² *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc.*, Petition to Deny, MB Docket No. 13-189 (July 24, 2013) *available at* <http://apps.fcc.gov/ecfs/document/view?id=7520937039>.

²³ Complaint at 10, *Dept. of Justice v. Gannett Co.*, No. 1:13-cv-01984 (D.D.C., Dec. 16, 2013), *available at* <http://www.justice.gov/atr/cases/f302500/302551.pdf> [hereinafter DOJ Complaint].

effective control over Sander's activities, however, is highly relevant and applies to all of the stations being sold in this transaction.

To comply with the settlement, Gannett and Sander entered into an agreement to sell KMOV to Meredith Corporation. To sweeten the deal, Gannett and Sander also agreed to sell two stations in Phoenix, AZ (KSDK and KASW) to Meredith.²⁴ Thus, the only remaining markets at issue in this transaction are Portland, OR; Tucson, AZ; and Louisville, KY.²⁵

The Bureau dismissed the Petition to Deny. It did not mention, much less explain, why it ignored Petitioners' claim that it lacked authority to consider this case and that it should be referred to the full Commission. Nor did it respond to the other arguments made by Petitioners, or address the DOJ's legal conclusions concerning Gannett's influence over Sander. Instead, the Bureau granted the application for license assignment. The Bureau focused narrowly on the separate contract provisions instead of assessing whether the transaction as a whole would serve the public interest. In making its decision, the Bureau principally relied on a series of staff-level Bureau decisions.²⁶ Significantly, in citing *Malara Broadcasting*, it did not mention that an application for review of that decision has been pending for nine years.²⁷

²⁴ Tim Baysinger, *Gannett Sells 3 TV Stations to Meredith*, MULTICHANNEL NEWS (DEC. 23, 2013), <http://www.multichannel.com/finance/gannett-sells-3-tv-stations-meredith/147364>.

²⁵ This ultimately means that Gannett is purchasing seventeen stations from Belo and will have sharing arrangements in Tucson, Louisville, and Portland.

²⁶ *E.g.*, *Decision*, *supra* note 11, at nn. 81-84 (citing *KHNL License Subsidiary, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 16087 (MB 2011); *SagamoreHill of Corpus Christi Licenses, LLC*, Letter, 25 FCC Rcd 2809 (MB 2010); *Piedmont Television of Springfield License LLC*, Letter, 22 FCC Rcd 13910 (MB 2007); *Malara Broadcasting Group of Duluth Licensee LLC*, Letter, 19 FCC Rcd 24070 (MB 2004); *Nexstar Broadcasting, Inc.*, Letter, 23 FCC Rcd 3528 (Vid. Div. 2008); *Chelsey Broadcasting Company of Youngstown, LLC*, Letter, 22 FCC Rcd 13905 (Vid. Div 2007)).

²⁷ In footnote 81 of the *Decision*, the Bureau cites *Malara*, among others, to support the idea that "[t]he Commission has approved applications for consent to television station transactions involving a combination of joint sales agreements, other types of shared services agreements, options and similar contingent interests, and guarantees of third-party debt financing, and has found these cooperative arrangements not to rise to the level of an attributable interest." The

III. The Full Commission Should Reverse the Gannett-Belo Decision and Media Bureau Precedent Related to Sharing Arrangements

The Commission should overturn the Bureau’s Gannett-Belo decision for three reasons: (1) the approval of the assignments involving sharing arrangements to evade the NBCO rule presents a novel question of law, fact, and policy that should be decided by the full Commission; (2) the Bureau’s decision was incorrect because the assignment of licenses is contrary to Section 310(d) of the Communications Act, which permits assignments only where they serve the public interest; and (3) failure to reverse this decision and the previously unreviewed Bureau precedents on which it relies will result in even greater evasion of media ownership rules through sharing arrangements.

A. The Gannett-Belo Transaction Presents a Novel Question of Law, Fact and Policy Regarding Whether Sharing Arrangements Can Be Used to Evade the NBCO Rule

Commission procedure specifies that certain matters “shall be referred to the Commission en banc for disposition.”²⁸ One such category is “[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.”²⁹ As Petitioners noted, the Gannett-Belo transaction presents for the first time whether a sharing arrangement may be used to evade the Commission’s NBCO rule, which prohibits common control of a daily newspaper and a television station in the same area.³⁰ As explained in the Petition to Deny, the Bureau lacks authority to decide novel issues of law, fact, and policy, and should have referred the question to the full Commission.³¹

Bureau misleadingly leaves out the currently-pending application for review filed in 2005. *Decision, supra* note 11, ¶ 27 n.81.

²⁸ 47 C.F.R. § 0.283.

²⁹ 47 C.F.R. § 0.283(c).

³⁰ 47 C.F.R. § 73.3555(d).

³¹ Petition to Deny, *supra* note 22, at 8-12 (citing 47 C.F.R. § 0.283).

The Bureau should have referred this case to the full Commission--instead, the Bureau simply did not address the question of its authority. In its decision, the Bureau relied heavily on its own precedent, which involved sharing arrangements between two TV stations in a market as opposed to a TV station and a daily newspaper.³² The NBCO rule, however, has a different purpose than the local TV ownership rules. In the *2010 Quadrennial Review*, the Commission stated that "[c]onsistent with previous Commission findings, we tentatively conclude that some newspaper/broadcast cross-ownership restrictions continue to be necessary to protect and promote viewpoint diversity. Research shows that newspapers and local television stations, and their affiliated websites, are the primary sources that consumers rely on for local news."³³ In contrast, the "local television ownership rule promotes competition within local television markets."³⁴ Yet, without any discussion of the different purposes of the rules or how Gannett will provide local news to Sander stations in the same markets, the Bureau approved the transaction.

B. The Bureau's Approval of the License Assignment Violates Section 310(d) of the Communications Act

A separate ground for overturning the Bureau decision is its failure to conduct the public interest analysis required by the Communications Act. The *Decision* correctly recognized that the Communications Act requires that no station license shall be assigned "except upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."³⁵ The Commission must determine whether the combination would violate any specific statutes or

³² See *supra* note 26 (listing the cases the Bureau relied upon, all of which dealt with the local TV ownership rules).

³³ *2010 Quadrennial Review*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, ¶ 89 (2011) [hereinafter *2010 QR*].

³⁴ *Id.* ¶ 25. See also *2006 Quadrennial Review*, Report and Order, 23 FCC Rcd 2010, 2064, 2066, ¶¶ 97, 101 (2008), remanded on other grounds, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004). In *Prometheus*, the Commission found that the local television ownership rule was not necessary to foster diversity because there were other outlets for diversity of viewpoint in local markets. *Id.* at 2065-66, ¶ 100.

³⁵ 47 U.S.C. § 310(d).

rules. If not, the Commission must then review whether the grant would “result in public interest harms (by substantially frustrating or impairing the objectives or implementation of the [Communications] Act or related statutes).”³⁶ But, while stating what was necessary to conclude that the assignments would serve the public interest, the Bureau failed to apply the correct standard.

1. The Bureau Failed to Review the Cumulative Effect of the Transaction under the Public Interest Standard

The *Decision* first noted that all of the agreements contain provisions asserting the relevant licensee will control the operations of the station.³⁷ It then observes that “SSAs covering technical and other back-office operations typically do not raise an issue under the Commission's attribution rules.”³⁸ Then it found that there is no programming component in Phoenix, and that the SSA in Tucson, which is with Raycom, does not exceed 15% of total programming.³⁹ Finally, it stated without any explanation that the “*Commission* has approved applications for consent to television station transactions involving a combination of joint sales agreements, other types of shared services agreements, options and similar contingent interests, and guarantees of third-party debt financing.”⁴⁰ But all of the cases cited in footnote 81 to support this claim are in fact decisions made by the Media Bureau, not the Commission.

Not only is the Bureau's conclusion unsupported by Commission authority, but it evidences a serious misunderstanding of the Commission's decision in *Ackerley* and the *1999 Attribution Order*, which the Bureau itself cited in paragraph 30 of the *Decision*.⁴¹ In *Ackerley*,

³⁶ *Decision*, *supra* note 11, ¶ 22.

³⁷ *Id.* ¶ 25.

³⁸ *Id.* ¶ 26.

³⁹ *Id.* ¶ 26. The decision does not explicitly address Louisville and Portland, where Gannett owns daily newspapers and will provide news programming to the sidecar stations.

⁴⁰ *Id.* ¶ 27 (emphasis added).

⁴¹ That language states, “we stress that ‘applicants and interested parties should not forget that our public interest mandate encompasses giving careful attention to the economic effects of, and

as recommended by the *1999 Attribution Order*, the Commission looked beyond the terms of the contracts and determined the probable incentives and effects. It determined that, even though the agreement did not explicitly violate any rule, the fact that the licensee was not entitled to keep any advertising revenues for the 15% of programming Ackerley would provide meant that the licensee had no incentive to reject Ackerley programming.⁴²

Here, Petitioners argued that the combinations would result in a loss of diversity in sources of local news because the provisions in each contract, taken together, confer most responsibility and risk on Gannett and almost no risk on the sidecar companies.⁴³ Some of the agreements allow Gannett to provide up to twenty-five hours per week of local news programming to the sidecar stations, an amount that may be less than 15% but still constitutes the station's entire local news programming.⁴⁴ The Bureau, however, focused exclusively on individual contract provisions. It did not review the cumulative effect of the transaction, as the Communications Act and *Ackerley* dictate.

When the agreements are considered as a whole, they clearly show that Gannett maintains significant control of the sidecar companies, Sander Co. and Tucker Co. In Portland and Louisville (both NBCO markets), the agreements include the following: shared programming (up to 15%), an exclusive marketing deal with Gannett, options allowing Gannett to purchase the station or the company, significant monthly fees to Gannett, one managerial

incentives created by, a proposed transaction taken as a whole and its consistency with the Commission's policies under the Act, including our policies in favor of competition, diversity, and localism." *Decision*, *supra* note 11, ¶ 30 (citing *1999 Attribution Order*, 14 FCC Rcd 12559, 12581, ¶ 44 (1999)).

⁴² *Ackerley*, *supra* note 1, at 10841.

⁴³ Petition to Deny, *supra* note 22, at 22-23 (Louisville), 26-27 (Tucson), 30-31 (Portland).

⁴⁴ S. DEREK TURNER, CEASE TO RESIST: HOW THE FCC'S FAILURE TO ENFORCE ITS RULES CREATED A NEW WAVE OF MEDIA CONSOLIDATION 38-40 ("The 15 Percent Programming Fiction"). Further, as has been argued in the past, re-publishers are not considered independent voices. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (this argument was also made in the application for review in *Malara*, *supra* note 4, at 11).

employee, shared work space, and performance bonuses for Gannett.⁴⁵ Thus, Gannett will be calling the shots because the single employee at the sidecar station would have no capacity to produce programming on his or her own.

Another indication that Gannett will be calling the shots is that after the DOJ forced divestiture of Belo's St. Louis, MO, station KMOV (which was sold to Meredith Communications), Gannett also entered into an agreement to sell KASW and KTVK in Phoenix, AZ, to Meredith.⁴⁶ That Sander agreed to the sale of the Phoenix stations not required by the DOJ strongly suggests that it is Gannett, not Sander, who is in control.

Therefore, the full Commission should overturn the Bureau's decision and should review the transaction's cumulative effects.

2. The Bureau Failed to Examine the Impact the Transaction Would Have on the Diversity of Sources for Local News

Even without a specific rule violation, the transaction is contrary to the purpose of the NBCO rule, which is to promote diversity in news. A decision allowing the subversion of the NBCO rule should explain why the underlying rationale is met or at least not undermined. The Bureau even acknowledged that there was "force to [the] contention" that the transaction "will substantially frustrate the objectives of" the NBCO rule. Despite that concession, and despite citing Petitioners' loss of diversity claims at least four times,⁴⁷ the Bureau did not analyze the issue.

This oversight must be corrected by the full Commission. The Bureau is obligated, under the public interest standard that it correctly described, to analyze whether a license transfer substantially frustrates the objectives of the Communications Act or other related statutes. Thus,

⁴⁵ *Id.* at 28-29.

⁴⁶ *Supra* note 24.

⁴⁷ *Decision, supra* note 11, ¶¶ 9-11.

in this case, the full Commission should not allow the Bureau to grant a license transfer without analyzing whether the transfer “substantially frustrates” diversity in local news sources.

Evidence shows that considerable harm to diversity results when stations share substantial resources. Professor Danilo Yanich has published two studies that discuss the negative impact of sharing arrangements. His 2011 study showed that many stations sharing resources also share stories, scripts, and videos, and tend to focus much less on local stories and much more on broader (national) stories.⁴⁸ His 2013 study showed that Honolulu, HI—a market with a pending application for review of a sharing arrangement—has a deficit of substantive political news coverage.⁴⁹ There is ample evidence to show that these agreements are harmful, and yet the Bureau did not discuss any of that evidence.

Thus, the full Commission should overturn the Bureau decision and analyze whether the public interest is served by losing an independent local news source in the affected markets.

3. The Bureau Failed to Address the Implications of the Department of Justice Findings of Undue Influence

Another reason to reverse the Bureau's decision is that it failed to take into account the DOJ's finding that Gannett would exercise significant control over Sander. Just a few days before the Bureau decision, the DOJ filed a complaint alleging that the Gannett-Belo transaction violated antitrust laws, and entered into a settlement requiring Gannett to spin-off Belo's St. Louis station, KMOV. The DOJ was concerned about the transaction for multiple reasons: the eight-year assignable option gave Gannett the ability to sell the right to purchase KMOV to a third party; Gannett had an obligation to repay the balance of the \$101 million loan Sander took out to purchase all the stations (this amount is “significantly less than the[stations’] actual

⁴⁸ Yanich's study discusses eight markets: Denver, CO; Jacksonville, FL; Dayton, OH; Des Moines, IO, Burlington, VT; Peoria, IL; Columbus, GA; Wichita Falls, TX.

⁴⁹ DANILO YANICH & PAUL RUIZ, POLITICAL ADS & LOCAL TV NEWS: THE HONOLULU CASE 6 (2013).

market value”⁵⁰); and Sander would have depended on Gannett for key services necessary to run KMOV.⁵¹ The DOJ said these, among other aspects of the transaction, created a sufficiently close ongoing business relationship between Gannett and Sander to undermine any incentive for aggressive competition.⁵²

The combination of those provisions led the DOJ to state that the sharing arrangements gave “Gannett significant influence over Sander’s conduct in operating the stations, *including KMOV-TV*, and also diminish[ed] Gannett’s and Sander’s incentives to compete vigorously with each other in sales of broadcast television advertising in St. Louis.”⁵³ While the DOJ’s enforcement remedy specifically dealt with the St. Louis market, the DOJ’s conclusions about improper influence applied beyond that market, which is made clear by the emphasized language above, “including KMOV-TV.” The provisions the DOJ found suspect can be found in other markets in the Gannett-Belo transaction.⁵⁴

While the DOJ’s merger review is limited to the effects on competition, the FCC must consider additional factors to determine whether the license transfer is consistent with the public interest.⁵⁵ The DOJ stated that “the various agreements between Gannett and Sander create an ongoing relationship between Gannett and Sander that did not exist between competitors Gannett

⁵⁰ DOJ Complaint, *supra* note 23, at 2.

⁵¹ *Id.* at 10.

⁵² *Id.* at 10.

⁵³ *Id.* at 3 (emphasis added).

⁵⁴ The Parent Option Agreement for the Portland and Louisville markets is assignable and last for eight years. Parent Option Agreement, Application of Gannett Co., *available at* https://licensing.fcc.gov/cdbs/CDBS_Attachment/getattachment.jsp?appn=101594755&qnum=5120©num=1&exhcnm=7. The Shared Services Agreement for the Portland and Louisville markets contains sharing of key services necessary to run those stations. Shared Services Agreement, Application of Gannett Co., *available at* https://licensing.fcc.gov/cdbs/CDBS_Attachment/getattachment.jsp?appn=101594755&qnum=5120©num=1&exhcnm=6.

⁵⁵ *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, 4247-48 (2011).

and Belo.”⁵⁶ This finding applies with equal force to the public interest analysis. If the Commission fails to reverse the Bureau decision, Gannett will have successfully eliminated an aggressive competitor in local news in the markets where Sander will hold the licenses.

C. The Commission Should Reverse Bureau Precedent and Provide Guidance As to the Extent to Which Sharing Arrangements Are Consistent With the Public Interest

Not only did the Bureau fail to conduct the full public interest analysis required by the Communications Act, but it based its conclusion on Bureau precedent that itself is inconsistent with the public interest and has never been reviewed by the full Commission. The absence of a definitive Commission decision only fuels the confusion over the relationship between sharing arrangements and the public interest. Thus, the full Commission should take this opportunity not only to reverse this flawed decision, but to provide future guidance as to the propriety of sharing arrangements.

1. Sharing Arrangements Raise an Issue of Broad Public Concern

The use of sharing arrangements presents a question of public concern that warrants Commission review for two reasons.

First, as discussed above, there are many pending applications for review on this issue, contributing to significant uncertainty over the current regulatory scheme. Without full Commission review, this uncertainty will remain, to the detriment of the public interest and the companies involved.

Second, Congress has expressed concern over the approval of sharing arrangements. Senator Rockefeller, Chairman of the Senate Commerce Committee, recently sent a letter urging the Commission to “approach each of the pending transactions cautiously.”⁵⁷ The Senator

⁵⁶ DOJ Complaint, *supra* note 23, at 10.

⁵⁷ Letter from Sen. Jay Rockefeller, U.S. Senate, to Hon. Tom Wheeler, Chairman, Federal Communications Commission (Nov. 25, 2013), *available at* http://www.freepress.net/sites/default/files/resources/Rockefeller_letter_to_Wheeler_SSAs_11_2

additionally ordered the GAO to study “the increasing use and impact of these agreements and other broadcaster coordination agreements, particularly in situations where assuming full ownership of a station would violate the FCC’s media ownership limits.”⁵⁸ Congressional concern notwithstanding, the Bureau freely authorized the Gannett-Belo transaction without regard for or acknowledgment of the Senator’s concerns. The full Commission should intervene to ensure that the decision is approached with the caution envisioned by Chairman Rockefeller.

2. Sharing Arrangements Will Further Proliferate Without Commission Intervention

As noted earlier, sharing arrangements have become a widely-used tool in recent years to evade media ownership limits. Industry analysts agree that this trend will only continue: “[t]he next round of TV station consolidation is coming fast and furious. . . . There is doubtless more to come.”⁵⁹ Others warn that “[n]early every group owner in the country is in overdrive . . . considering the various combinations. It is a time to gobble or get gobbled.”⁶⁰

The proliferation of sharing arrangements is alarming because of the ease with which they obtain Bureau authorization. The Bureau has adopted an extreme hands-off approach to these arrangements, approving such transactions so long as the contracts include specific language. This type of routine, “rubber-stamp” approach, however, is improper. Without the full Commission’s intervention, the Bureau will continue to simply check whether the contracts contain language giving ultimate authority to the licensee, rather than evaluate the proposed

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⁵⁸ *Id.*

⁵⁹ Lisa Brown, *KSDK Parent Gannett to Buy KMOV's Parent Company*, ST. LOUIS POST-DISPATCH (June 14, 2013), http://www.stltoday.com/business/local/ksdk-parent-gannett-to-buy-kmov-s-parent-company/article_31e7fb91-676f-50cb-825f-9f9f6a6e6f8c.html.

⁶⁰ Brian Stelter and Christine Haughney, *Tribune in \$2.7 Billion Deal for 19 Local TV Stations*, N.Y. TIMES (July 1, 2013), <http://dealbook.nytimes.com/2013/07/01/tribune-to-buy-19-tv-stations-for-2-7-billion>.

transaction as a whole and conduct the public interest analysis required by the Communications Act.

3. Reversal Does Not Implicate Reliance Interests

Finally, although the transacting parties cited to prior staff decisions in their application, there are no reliance interests at issue here. It is the "Commission's general rule that parties who rely on staff advice do so at their own risk."⁶¹ This is especially true when the staff decisions are non-final and review is pending. Not only are cases such as *Malara* pending Commission review, many Bureau decisions released since then rely on *Malara* but fail to mention the pending application for review.⁶² Thus, the Commission may alter the Bureau's decision in this case and in previous cases without implicating reliance interests.

Conclusion

For the foregoing reasons, the full Commission must reverse the Bureau's decision in the Gannett-Belo Order. Further, it must overturn Bureau precedents because they are not in the public interest.

⁶¹ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 18 FCC Rcd 7615, 7617-18 (2003) (footnote omitted); *AAT Electronics Corp.*, Memorandum Opinion and Order, 93 FCC 2d 1034, 1047 (1983), *aff'd sub nom.* P&R Temmer v. FCC, 743 F.2d 918, 931 (D.C. Cir. 1984). *See also Applications of Hinton Telephone Co.*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11625, 11637 (1995) ("When the staff advice is contrary to the Commission's rules, the Commission may still enforce its rules, despite any reliance by the public."), *aff'd sub nom. Knollwood, Ltd. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996).

⁶² *E.g., Piedmont Decision*, *supra* note 5, at 13913 ("[T]he agreements . . . are in accordance with arrangements we have previous approved, such as those in *Malara*."); *SagamoreHill Decision*, *supra* note 13, at 2814 nn.24-25.

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CERTIFICATE OF SERVICE

I, Eric Null, hereby certify that copies of the Application for Review 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 22nd of January, 2014, on the following persons at the addresses shown below.

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