

*Before the*  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
Application for Consent to Assignment of ) MB Docket No. 13-190  
Broadcast Station Licenses from Local TV, )  
LLC to Dreamcatcher Broadcasting, LLC )  
 )

**APPLICATION FOR REVIEW**

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

Catherine Yang  
Georgetown Law Student

Eric G. Null  
Angela J. Campbell  
Andrew Jay Schwartzman  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, NW  
Suite 312  
Washington, DC 20001  
(202) 662-9535

*Counsel for Free Press*

Dated: January 22, 2014

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## Summary

The Media Bureau’s decision to grant certain license transfers from Local TV Holdings, LLC (“Local TV”) to Tribune Broadcasting Company II, LLC (“Tribune”) and Dreamcatcher Broadcasting, LLC (“Dreamcatcher”) on December 20, 2013, should be overturned by the full Commission. This transaction involves “Shared Service Agreements” (“sharing arrangements”) in a market where outright ownership of the stations by Tribune would have run afoul of the Commission’s media ownership rules—specifically, the newspaper-broadcast cross-ownership rule (“NBCO rule”). The sharing arrangements allow Tribune to acquire the stations, then assign the licenses to a third party “sidecar” company, Dreamcatcher, and still receive income from and provide services to the stations.

The Petition to Deny filed by Free Press alleged that granting the assignments was inconsistent with the public interest because, among other harms, the cumulative effect of the transaction was to reduce diversity of news sources in the 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: neither the Bureau nor the full Commission has determined whether a sharing arrangement can be used to evade the NBCO rule.

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—which 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’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, as a result of the sharing arrangements, the market essentially has permanently lost an independent voice and competing provider of local news programming. Related to such loss of diversity, there is evidence across various markets indicating that these sharing arrangements harm the quality of local news. 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 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**

Pursuant to 47 C.F.R. § 1.115, Free Press, through its attorneys, the Institute for Public Representation, seek full Commission review of the Media Bureau’s decision in *Applications for Consent to Transfer of Control of Certain Licensee Subsidiaries of Local TV Holdings, LLC*, Memorandum and Order, MB Docket No. 13-190, 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 relied 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 the Commission has not yet addressed whether the newspaper-broadcast cross-ownership rule may legally be circumvented by a sharing arrangement?
2. Were the license assignments in the Tribune-Local TV 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 permitted Ackerley to 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.”<sup>1</sup> 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.

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.

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<sup>1</sup> *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).

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.<sup>2</sup>

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, for 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*.<sup>3</sup> 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."<sup>4</sup> 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."<sup>5</sup> Further, the application claimed that the Bureau

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<sup>2</sup> 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.

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

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

<sup>5</sup> *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 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.

failed 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.”<sup>6</sup> 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.<sup>7</sup> 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.”<sup>8</sup> 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.<sup>9</sup> 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 name are separately owned, can work together in contravention of the Commission’s rules. Briefly, the Bureau’s “case law” establishes that the Bureau will approve such arrangements so

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<sup>6</sup> *Malara* Application for Review, *supra* note 4, at 10.

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

<sup>8</sup> *Id.*

<sup>9</sup> *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.”).

long as the sidecar licensee of the relevant stations remains contractually responsible for decisions about programming, finances, and personnel.<sup>10</sup> However, such control is nominal because the sidecar, for example, need only furnish one managerial employee,<sup>11</sup> may allow another station to provide up to 15% of its programming (typically all of the station's local news),<sup>12</sup> need not produce any programming on its own, may completely merge its operations with one or more stations in the same market,<sup>13</sup> is permitted to have another station sell all of its local spot advertising time,<sup>14</sup> and can allow the other owner to bear most of the financial risks and obtain most of the rewards.<sup>15</sup>

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.<sup>16</sup> Based on the most recent data compiled by Free Press, at least 103 out of 210 DMAs have two or more stations with sharing arrangements.<sup>17</sup> This is a

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<sup>10</sup> E.g., *Hawai'i Decision*, *supra* note 7, at 16092.

<sup>11</sup> E.g., *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 "one employee" requirement was first allowed in the Gannett-Belo 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).

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

<sup>13</sup> 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*].

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

<sup>15</sup> E.g., *Hawai'i Decision*, *supra* note 7.

<sup>16</sup> 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).

<sup>17</sup> *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 DMAs

significant jump from only two years prior, when another report concluded that 83 markets had sharing arrangements.<sup>18</sup>

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,<sup>19</sup> and nearly 300 TV stations changed hands.<sup>20</sup> The Tribune-Local TV transaction is part of a wave of major media mergers involving sharing arrangements; others include Gannett's acquisition of Belo,<sup>21</sup> Sinclair's acquisition of Fisher, and Sinclair's pending acquisition of Allbritton. Most 2013 acquisitions included multiple sharing arrangements.

### **B. Background on Tribune-Local TV Transaction**

In July 2013, Tribune and Local TV entered into an agreement under which Tribune would purchase all of Local TV's nineteen TV stations. Because outright acquisition of the WTKR(TV) and WGNT(TV) stations<sup>22</sup> in the Norfolk/Portsmouth/Newport News, VA market would have violated the Commission's NBCO rule, Tribune entered into various sharing arrangements (including Shared Service Agreements) with sidecar company Dreamcatcher. These sharing arrangements allowed Tribune to provide Dreamcatcher with, among other

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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>.

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

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

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

<sup>21</sup> Public Interest Petitioners challenged the Gannett-Belo merger. *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>.

<sup>22</sup> A third station, WNEP-TV in Pennsylvania, was part of the original Petition to Deny. While the Bureau denied standing to Put People First PA and Free Press regarding that station, the same public interest concerns are present and should not be ignored.

services, programming, back-office and payroll support, assistance with distribution matters, and promotional services.

Free Press and Put People First PA filed a Petition to Deny the license assignments.<sup>23</sup> 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: to “promote competition and diversity in local news.”<sup>24</sup> In addition, Petitioners argued that the full Commission, not the Bureau, should decide the case. Because the question of sharing arrangements in the context of the NBCO rule has never been resolved, this 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 Bureau dismissed the Petition to Deny and granted the application for license assignment. The Bureau acknowledged Petitioners’ claim to refer this case to the full Commission, but argued it did not have to because it could be “resolved under existing precedents and guidelines.”<sup>25</sup> The Bureau focused narrowly on examining the contract provisions individually 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 that have not been affirmed by the full Commission.<sup>26</sup>

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<sup>23</sup> *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>. The Media Bureau found that Put People First PA, but not Free Press, lacked standing to file a petition to deny. Thus, Free Press files the present application for review.

<sup>24</sup> *Id.* at 9.

<sup>25</sup> *Applications for Consent to Transfer of Control of Certain Licensee Subsidiaries of Local TV Holdings, LLC*, Memorandum Opinion and Order, MB Docket No. 13-190 (Dec. 20, 2013) [hereinafter *Decision*], at 9, n.61.

<sup>26</sup> *Id.* at nn. 56-58 (citing *SagamoreHill of Corpus Christi Licenses, LLC*, Letter, 25 FCC Rcd 2809 (MB 2010); *Nexstar Broadcasting, Inc.*, Letter, 23 FCC Rcd 3528 (Vid. Div. 2008)).

### **III. The Full Commission Should Reverse the Tribune-Local TV Decision and Media Bureau Precedent Related to Sharing Arrangements**

The Commission should overturn the Bureau’s Tribune-Local TV 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 Tribune-Local TV 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.”<sup>27</sup> One such category is “[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.”<sup>28</sup> As Petitioners noted, the Tribune-Local TV transaction squarely presents the unresolved question of 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.<sup>29</sup> 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.<sup>30</sup>

In its decision, the Bureau relied heavily on its own precedent, which involved sharing arrangements between two TV stations in a market, not—as is the case here—between a TV

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<sup>27</sup> 47 C.F.R. § 0.283.

<sup>28</sup> 47 C.F.R. § 0.283(c).

<sup>29</sup> 47 C.F.R. § 73.3555(d).

<sup>30</sup> Petition to Deny, *supra* note 23, at 9-10 (citing 47 C.F.R. § 0.283).

station and a daily newspaper in the same market.<sup>31</sup> 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.”<sup>32</sup> In contrast, the “local television ownership rule promotes competition within local television markets.”<sup>33</sup> Yet, the Bureau disposed of this issue in a single footnote, claiming that the argument is “misplaced” because the Bureau must compare this sharing arrangement with existing precedent to determine whether there is an attributable interest. The Bureau, in deciding that this case did not need to be referred to the full Commission, did not discuss the different purposes of the rules. It simply applied its precedent without adequate explanation.

**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.”<sup>34</sup> The Commission must determine whether the combination would violate any specific statutes or

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<sup>31</sup> See *supra* note 26 (listing the cases the Bureau relied on, all of which dealt with the local TV ownership rules).

<sup>32</sup> *2010 Quadrennial Review*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, ¶ 89 (2011) [hereinafter *2010 QR*].

<sup>33</sup> *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.

<sup>34</sup> 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.”<sup>35</sup> But, while identifying the necessary steps to conclude that the assignments would serve the public interest, the Bureau failed to apply the standard correctly.

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

The *Decision* first noted that the agreements contain provisions asserting that Dreamcatcher would control the policies, operations, and management of the stations.<sup>36</sup> It then observed that both the programming limits and engineering and back-office support provided for in the arrangements were “consistent with those we have approved in the past.”<sup>37</sup> The Bureau concluded, after looking at the individual terms of the arrangements, that they were “consistent with our precedent.”<sup>38</sup> However, all the cases cited to in support of the Bureau’s position were decisions made by Bureau staff, not by the full 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 footnote 60 of the *Decision*.<sup>39</sup> In *Ackerley*, as recommended in the *1999 Attribution Order*, the Commission looked beyond the terms of the contracts and determined their probable incentives and effects. It determined that, even though

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<sup>35</sup> *Decision*, *supra* note 25, ¶ 9.

<sup>36</sup> *Id.* ¶ 12.

<sup>37</sup> *Id.* ¶ 16.

<sup>38</sup> *Id.*

<sup>39</sup> 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 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 25, n.60 (citing *1999 Attribution Order*, 14 FCC Rcd 12559, 12581, ¶ 44 (1999)).

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.<sup>40</sup> Though *Ackerley* specifically dealt with advertising revenues, the Commission’s cumulative approach to evaluating the sharing arrangements should have been followed in this case.

Here, Petitioners argued that the combination as a whole would result in reduced competition and localism, as well as a loss of diversity of news sources because the provisions in the contracts, taken together, confer most responsibility and risk on Tribune and almost no risk on Dreamcatcher.<sup>41</sup> 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 Tribune maintains significant control of the sidecar company, Dreamcatcher. Under the arrangements, only Tribune, not Dreamcatcher, has a right of recourse against Local TV in the event of a breach of contract; Tribune controls all technical, promotional, and marketing services; and Tribune provides programming (up to 15% per week, which could constitute the station’s entire local news programming),<sup>42</sup> over which it exercises editorial judgment.<sup>43</sup> Further, Ed Wilson, a former Tribune executive, owns Dreamcatcher. The Bureau dismissed this by saying, “[w]e do not find anything suspect in the fact that, several years ago, [Wilson] was associated with the

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<sup>40</sup> *Ackerley*, *supra* note 1, at 10841.

<sup>41</sup> Petition to Deny, *supra* note 23, at 6-7.

<sup>42</sup> 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).

<sup>43</sup> *Id.*

company.”<sup>44</sup> It is not just that Mr. Wilson was merely “associated” with Tribune, but that he was its former president and chief revenue officer.<sup>45</sup> Thus, he was one of its top executives until a mere three years ago and has a remarkable familiarity with Tribune’s business interests and methods. This fact, combined with the others above, creates serious doubts as to who truly controls Dreamcatcher.

Because the Bureau failed to assess the cumulative effect of the agreements, the full Commission should overturn the Bureau’s decision and review the transaction as a whole.

## **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. Yet, the Bureau did not analyze the issue.<sup>46</sup>

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, 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 on the news. His 2011 study showed that many stations

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<sup>44</sup> *Decision, supra* note 25, ¶ 15.

<sup>45</sup> *Petition to Deny, supra* note 23, at 6.

<sup>46</sup> In the *Decision, supra* note 25, ¶ 17, n.60, the Bureau cross-referenced paragraphs 29 and 30 of the *Gannett-Belo Decision*. In those paragraphs, the Bureau admitted there was “force to [the] contention” that the transaction “will substantially frustrate the objectives of” the NBCO rule. The Bureau did not discuss this language in the *Decision*.

sharing resources also share stories, scripts, and videos, and tend to focus much less on local stories and much more on broader (national) stories.<sup>47</sup> 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.<sup>48</sup> 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.

**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, 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.

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<sup>47</sup> Yanich’s study discusses eight markets: Denver, CO; Jacksonville, FL; Dayton, OH; Des Moines, IO, Burlington, VT; Peoria, IL; Columbus, GA; Wichita Falls, TX.

<sup>48</sup> DANILLO YANICH & PAUL RUIZ, POLITICAL ADS & LOCAL TV NEWS: THE HONOLULU CASE 6 (2013).

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.”<sup>49</sup> The Senator 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.”<sup>50</sup> Congressional concern notwithstanding, the Bureau freely authorized the Tribune-Local TV 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.”<sup>51</sup> 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.”<sup>52</sup>

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

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<sup>49</sup> 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\\_25\\_13.pdf](http://www.freepress.net/sites/default/files/resources/Rockefeller_letter_to_Wheeler_SSAs_11_25_13.pdf).

<sup>50</sup> *Id.*

<sup>51</sup> 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](http://www.stltoday.com/business/local/ksdk-parent-gannett-to-buy-kmov-s-parent-company/article_31e7fb91-676f-50cb-825f-9f9f6a6e6f8c.html).

<sup>52</sup> 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>.

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 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.”<sup>53</sup> 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.<sup>54</sup> Thus, the Commission may alter the Bureau’s decision in this case and in previous cases without implicating reliance interests.

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<sup>53</sup> *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).

<sup>54</sup> *E.g.*, *Piedmont Television of Springfield Licensee, LLC*, Letter, 22 FCC Rcd 13910, 13913 (MB 2007) (“[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.

### **Conclusion**

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

Respectfully submitted

/s/

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Eric G. Null  
Angela J. Campbell  
Andrew Jay Schwartzman  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, NW  
Suite 312  
Washington, DC 20001  
(202) 662-9535

*Counsel for Free Press*

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

Catherine Yang  
Georgetown Law Student

Dated: January 22, 2014

## CERTIFICATE OF SERVICE

I, Eric Null, hereby certify that copies of the Application for Review by Free Press, 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.

Mace J. Rosenstein  
Covington & Burling LLP  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004  
mrosenstein@cov.com  
*Counsel for Tribune Broadcasting  
Company II, LLC*

Best Copy and Printing, Inc.  
Portals II  
445 12th Street, SW  
Room CY-B402  
Washington, DC 20554  
fcc@bcpiweb.com (by email only)

Jack N. Goodman  
Law Offices of Jack N. Goodman  
1200 New Hampshire Avenue, NW, Suite 800  
Washington, DC 20036  
jack@jackngoodman.com  
*Counsel for Dreamcatcher Broadcasting, LLC*

William Lake  
Barbara Kreisman  
David Roberts  
Video Division, Media Bureau  
Room 2-A728  
Federal Communications Commission  
445 Twelfth Street SW  
Washington, DC 20554  
david.roberts@fcc.gov (by email only)

Michael D. Basile  
Cooley LLP (formerly Dow Lohnes PLLC)  
1299 Pennsylvania Avenue, NW, Suite 700  
Washington, DC 20004  
mdbasile@cooley.com  
*Counsel for Local TV Holdings, LLC*

cc (by email):  
Gigi Sohn  
Maria Kirby  
Adonis Hoffman  
Clint Odom  
Matthew Berry  
Courtney Reinhard

Respectfully Submitted,

/s/

---

Eric Null

January 22, 2014

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