

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

In the Matter of:)
)
Applications for Consent to) MB Docket No. 13-189
Assignment of Television Station Licenses)
from Subsidiaries of Belo Corp. to)
Subsidiaries of Sander Holdings Co. LLC and)
Tucker Operating Co. LLC)

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

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I. INTRODUCTION AND SUMMARY.

Gannett Co., Inc. (“Gannett”), by its counsel, opposes the Application for Review (“AFR”) filed by Georgetown University Law Center’s Institute for Public Representation and Free Press on behalf of their clients (collectively “IPR”)¹ in this matter. The AFR objects to the grant by the Media Bureau (the “Bureau”) of applications (the “Assignment Applications”) filed by Belo Corp. (“Belo”), Sander Holdings Co. LLC (“Sander”), and Tucker Operating Co. LLC (“Tucker”), for consent to assign the licenses of stations in three markets — Louisville, Portland, and Tucson — from Belo to Sander and to Tucker.² The parties to the transaction relied on the

¹ IPR consists of Free Press, NABET-CWA, TNG-CWA, National Hispanic Media Coalition, Common Cause, and Office of Communication, Inc., of the United Church of Christ.

² On December 23, 2013, following grant of the Assignment Applications, Sander acquired stations in Louisville, Portland, and Tucson, and Tucker acquired a station in Tucson. The AFR objects only to the assignment applications in those three markets, stating that “the only remaining markets at issue in this transaction are Portland, OR; Tucson, AZ; and Louisville, KY.” AFR at 8. Despite its purported objection with respect to Tucson, the AFR presents specific arguments only with respect to Louisville and Portland, and it has not raised a sufficient argument with respect to the other applications addressed by the Bureau’s decision to preserve a challenge. Nevertheless, out of an abundance of caution, Gannett addresses its response to all three markets identified by the AFR as contested.

Commission's rules and policies and Bureau decisions issued pursuant to delegated authority. The Bureau correctly concluded, based on a thorough review of the record, that grant of the Assignment Applications complied fully with applicable law and Commission regulations and served the public interest.

Contrary to IPR's assertion that the transaction raised novel legal issues, the Bureau correctly determined that the sharing arrangements pursuant to which Gannett provides certain services to Sander in Louisville, Portland, and Tucson and to Tucker in Tucson "fall[] within those combinations previously approved" and do "not . . . rise to the level of an attributable interest."³ In an effort to manufacture an issue where none exists, the AFR incorrectly asserts that the Bureau ignored matters squarely addressed by the *Order*, mischaracterizes the arrangements between the parties, and introduces baseless speculation. The Commission should decline IPR's invitation to reopen its rules in the context of a transaction structured to comply with those rules, and it should instead consider IPR's requests for legal change only in the context of a rulemaking proceeding accompanied by notice and comment.

II. THE BUREAU PROPERLY EXERCISED ITS DELEGATED AUTHORITY AND CORRECTLY GRANTED THE ASSIGNMENT APPLICATIONS.

The AFR claims that the Bureau lacked authority to grant the Assignment Applications because, in IPR's view, they presented "novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines."⁴ The Bureau properly rejected that argument. Existing Commission precedent provided a sound basis for the Bureau to grant

³ *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc.*, MB Docket No. 13-189, DA 13-2423, at ¶ 27 (Dec. 20, 2013) ("*Order*"). These conclusions also applied to the Phoenix and St. Louis markets. *See id.*

⁴ AFR at 9 (quoting 47 C.F.R. § 0.283(c)).

the Assignment Applications. As the Bureau stated, “[w]here, as here, the Commission has adopted rules to promote diversity, competition, localism, or other public interest concerns, those rules may form a basis for determining whether the transfer and assignment applications are on balance in the public interest.”⁵ The Bureau based its analysis of service agreements on “[t]he Commission’s *rule-based* attribution benchmarks, which are set forth in Note 2 to Section 73.3555 of the Commission’s rules,” Commission policy statements establishing those standards, and Bureau precedent applying those standards.⁶ It correctly determined that the guarantee and option in the overlap markets were “within, and d[id] not approach, the limits [that the Commission has] previously set forth in our attribution rulemakings governing individual financial interests.”⁷ In sum, the Bureau correctly applied the Commission’s rules and policies, which speak fully to the relevant legal matters, and it acted properly pursuant to its delegated authority in finding that the transaction complied with all such obligations in all markets, including the markets at issue.⁸

The Bureau had ample sources of Commission guidance in reaching its decision, contrary to IPR’s claim that the Assignment Applications could not be resolved under existing precedent. The AFR incorrectly asserts that “[t]he full Commission has addressed attribution and modern sharing arrangements on only one occasion,” citing *Ackerley*.⁹ In fact, the

⁵ *Order* ¶ 22.

⁶ *Id.* ¶¶ 25-27 (emphasis added).

⁷ *Id.* ¶ 26.

⁸ *See, e.g., Coronado Commc’ns Co.*, Memorandum Opinion and Order, 8 FCC Rcd 159, 160 n. 5 (MB 1992) (where “resolution of the issues in a case, both legal and technical, are rooted in Commission precedent . . . the staff is able to act”).

⁹ AFR at 2 (citing *Shareholders of the Ackerley Group, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 10828, 10841 (2002) (“*Ackerley*”). This ignores the second *Ackerley* decision, in (continued...)

Commission has undertaken numerous proceedings, including its quadrennial reviews, to consider its rules and policies regarding same-media and cross-media ownership issues, including its standards for attribution.¹⁰ The policies embodied in the Commission’s decisions and rules are detailed and thorough, reflecting careful Commission consideration of the relevant issues.¹¹

Further, the Bureau properly relied on its own precedent, contrary to IPR’s claims otherwise. A Bureau decision reached pursuant to delegated authority serves as valid precedent.¹² Indeed, when the full Commission reviews a media transaction, it may cite Bureau

which the full Commission rejected a petition for reconsideration as to the grant of applications involving sharing arrangements. *See Clear Channel Broadcasting Licenses, Inc.*, 22 FCC Rcd 21196 (2007).

¹⁰ *See, e.g., Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 125591 (1999) (“1999 Attribution Order”); *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2016-17 (2008) (“2006 Quadrennial Review Order”). The Commission also discussed these issues in the *2010 Quadrennial Review - Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011) (“2011 NPRM”). The treatment of attribution issues in these and other proceedings underscore that rulemaking is the appropriate forum for adjusting these rules.

¹¹ *See, e.g.,* 47 C.F.R. § 73.3555 Note 2(i) (providing that a normally non-attributable interest in a broadcast station, cable television system, or daily newspaper is attributable if certain specific conditions are met); 47 C.F.R. § 73.3555 Note 2(j) (specifying the conditions under which a time brokerage agreement will be attributable); *2011 NPRM*, 26 FCC Rcd at 17565 (stating that JSAs “are not precluded by any Commission rule or policy as long as the Commission’s ownership rules are not violated and the participating licensees maintain ultimate control over their facilities”). The conditions for attribution pursuant to the Commission’s rules were not met here.

¹² *See, e.g., Implementation of the Telecommunications Act of 1996*, 13 FCC Rcd 17018, 17068 (1998) (“[S]taff rulings on the docket will have the same precedential value as any other adjudicative decision issued under delegated authority. . . . Such decisions will serve as valuable precedent to parties negotiating or litigating similar conflicts in the future.”).

precedent in reaching its decision, as it did in *Ackerley*.¹³ Although the AFR cites applications for review outstanding as to certain Bureau decisions, the absence of Commission action on such applications does not cast doubt on the accuracy or validity of the Bureau's earlier decisions. If anything, the absence of Commission action shows that the Commission has not been inclined to disrupt the Bureau's decisions.

Finally, the Bureau properly identified that it relied on its delegated authority in granting the Assignment Applications. IPR erroneously asserts that "the Bureau simply did not address the question of its authority."¹⁴ In fact, the first page of the *Order* states that the Bureau acted "pursuant to delegated authority."¹⁵ The first function delegated to the Bureau by the Commission is the authority to "[p]rocess applications for authorization, assignment, transfer and renewal of media services, including AM, FM, TV, the cable TV relay service, and related services."¹⁶ The Bureau's determination to act pursuant to that authority was appropriate and consistent with the Commission's rules and applicable precedent.

III. THE BUREAU CONDUCTED A THOROUGH REVIEW OF THE RELEVANT ISSUES.

Contrary to the AFR's assertions, the Bureau properly considered all aspects of the transaction. First, it simply is not true, as the AFR alleges, that the Bureau failed to consider the overall effect of the transaction or the full record. The Bureau's "findings [were] based on the record before" it, and the Bureau "incorporate[d] into [its] analysis issues raised by petitions

¹³ See, e.g., *Ackerley*, 17 FCC Rcd at 10833 & n. 32 (citing a prior Bureau decision in determining that staff reached the correct decision); *Id.* at 10835 & n. 37 (2002) (citing a Bureau decision in finding that "several of our past decisions" supported grant of a requested temporary waiver).

¹⁴ AFR at 10.

¹⁵ *Order* ¶ 2.

¹⁶ 47 C.F.R. § 0.61(a).

to deny and other comments filed in this proceeding.”¹⁷ IPR’s Petition to Deny raised the same ‘cumulative effect’ argument that it articulates in the AFR, and it was considered by the Bureau in denying the Petition.¹⁸ The *Order* emphasized that the Bureau’s analysis in all transactions “necessarily involves, as [its] licensing decisions have long noted, the use of a ‘case-by-case’ approach,” and the Bureau correctly “conclude[d] that grant of the applications and overall transaction . . . will serve the public interest, convenience, and necessity.”¹⁹

Further contrary to IPR’s claim, the Bureau considered the impact of the transaction on diversity. As the Bureau found, the transaction promotes the public interest taking into account “the Commission’s policies under the Act, including [its] policies in favor of competition, diversity, and localism.”²⁰ The ownership rules and policies established by the Commission represent a balance between those three values: as the Commission has stated, “[t]he media ownership rules are designed to foster the Commission’s longstanding policies of competition, diversity, and localism.”²¹ In the newspaper/broadcast cross-ownership context, the Commission’s policymaking decisions specifically have taken into account “its localism goal,” “its competition goal,” and diversity.²² The Bureau correctly applied the Commission’s rules and policies and assessed the overall impact of the transaction on all of the public interest factors of importance to the Commission.

¹⁷ *Order* ¶ 23.

¹⁸ Free Press *et al.*, Petition to Deny, MB Docket No. 13-189, at 13 (July 24, 2013) (“*IPR Petition to Deny*”).

¹⁹ *Order* ¶¶ 30, 33.

²⁰ *Id.* ¶ 30.

²¹ 2006 *Quadrennial Review Order*, 23 FCC Rcd at 2016.

²² 2011 *NPRM*, 26 FCC Rcd at 17519.

Finally, although IPR claims that the Bureau failed to “take into account” the view of the Department of Justice (“DOJ”),²³ the record demonstrates that the Bureau expressly considered the DOJ’s position.²⁴ The DOJ consent decree was specifically referenced in the *Order*, and the Bureau concluded that “that grant of the applications and overall transaction, as modified in the Consent Decree entered into with the Department of Justice, will serve the public interest, convenience, and necessity.”²⁵ The DOJ’s Complaint and the consent decree negotiated with the parties with respect to the transaction did not result in any adjudicated finding of fact,²⁶ and, in any event, the Consent Decree does not apply to the three markets that the AFR asserts are at issue here — Louisville, Portland, and Tucson.²⁷ Regardless, IPR acknowledges that the Commission and Bureau “consider additional factors” beyond those considered by the DOJ,²⁸ and that analysis must reflect the Commission’s own rules and independent mandate. As described above, such analysis considers the Commission’s rules and policies, and can take into account factors such as the benefits of SSAs in creating operating efficiencies that will support local news and other services.²⁹ The detailed analysis set forth in the *Order* demonstrates that

²³ AFR at 14.

²⁴ See *Order* ¶¶ 7, 16 n.50, 33. See also *Gannett Co., Inc., et al.*, Notification of Ex Parte Communication, MB Docket No. 13-189, at 1 (Dec. 18, 2013) (referencing that the DOJ has completed its review and has filed its documents with the court).

²⁵ *Order* ¶ 33.

²⁶ The DOJ’s Complaint and Competitive Impact Statement are not adjudicated decisions subject to the Administrative Procedure Act. Moreover, the court does not adjudicate the merits of the Complaint, but rather it determines whether entry of the Proposed Final Judgment is in the public interest. See 15 U.S.C. § 16(e).

²⁷ See *United States v. Gannett Co., Inc.*, Case 1:13-cv-01984, Proposed Final Judgment, (D.D.C. Dec. 12, 2013).

²⁸ AFR at 15.

²⁹ As Commissioner Pai has stated, “[a]s broadcasters’ share of the advertising market has shrunk in the digital age, television stations must be able to enter into innovative arrangements in (continued...)

the Bureau engaged in a thorough analysis of the transaction that took into account the full record before it.³⁰ In short, the Bureau correctly considered the DOJ's position, gave it appropriate weight, and formed its conclusion based on the Commission's different mandate, applicable Commission rules and the record before the Bureau.

IV. THE AFR CONTAINS NUMEROUS INACCURATE AND MISLEADING STATEMENTS.

The AFR contains numerous inaccurate and misleading statements, which the Commission should not credit. For example:

- IPR incorrectly claims that a “‘one employee’ requirement was first allowed in the” *Order*.³¹ In fact, the agreements provide that in each market, each of Sander and Tucker are required to have, at a minimum, the number of employees required in order to comply with the Commission's rules, including *at least* one managerial employee.³² Thus, the

order to operate efficiently. JSAs and SSAs allow stations to save costs and to provide the services that we should want television broadcasters to offer.” Oversight of the FCC, Hearing Before the Committee on Commerce, Science, and Transportation of the United States Senate, 113th Cong. 8 (2013) (statement of Ajit Pai, Commissioner, FCC), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-319469A1.pdf.

³⁰ The Bureau granted IPR's request for permit-but-disclose status, affording IPR and others ample opportunities to present their views. *See* Media Bureau Announces Permit-But-Disclose Status, 28 FCC Rcd 11069 (2013). *See also, e.g.*, Charter Communications *et al.*, Notification of Ex Parte Communication, MB Docket No. 13-189 (Dec. 20, 2013); Free Press *et al.*, Notification of Ex Parte Communication, MB Docket No. 13-189 (Dec. 19, 2013); Sander Media LLC *et al.*, Notification of Ex Parte Communication, MB Docket No. 13-189 (Dec. 13, 2013); Free Press, Notification of Ex Parte Communication, MB Docket No. 13-189 (Sept. 20, 2013).

³¹ AFR at 5 n.11.

³² Each pertinent agreement states that “Station Licensee shall maintain for the Station sufficient personnel to comply with its obligations as a broadcast licensee under the FCC Rules. Such personnel shall (a) include not less than one managerial employee” Louisville/Portland SSA § 3.1; *accord* Tucson TSA § 3.1.

provision ensures compliance with the Commission’s requirements, and the Bureau correctly applied longstanding Commission precedent.³³

- IPR repeatedly accuses the parties of “evad[ing]” the Commission’s rules, emphasizing that the transaction was structured so that Gannett did not acquire Belo stations in certain markets in which it possessed an existing newspaper property.³⁴ Yet the fact that Gannett *complied* with the ownership rules and attribution limits is no basis for objection. The Commission should not give IPR’s wordplay any credence.
- IPR simply speculates about the relationship between independent companies Gannett and Sander. IPR’s speculation is unfounded: the agreements between the parties were negotiated at arm’s length and based on each party’s market-driven decisions. Further, mere speculation is insufficient to support an application for review.³⁵
- IPR erroneously claims that reversal does not implicate any reliance interests, stating that “parties who rely on staff advice do so at their own risk.”³⁶ The parties did not rely on informal staff advice. They relied on the Communications Act, Commission rules,

³³ See Order ¶ 28 (citing *Ackerley* 17 FCC Rcd at 10842; *Hispanic Broadcasting Corporation*, 18 FCC Rcd at 18848) (concluding that “each station will have enough personnel to meet the minimum staffing requirements of the Main Studio Rule”).

³⁴ See, e.g., AFR at i.

³⁵ See, e.g., *Mandeville Broadcasting Corp.*, Memorandum Opinion and Order, 2 FCC Rcd 2523, 2523 (1987) (stating that the “allegations regarding the submissions provided with [an] application for review constitute nothing more than speculation and surmise and fail to rise to the level of a substantial and material issue”).

³⁶ AFR at 18.

Commission orders, and Bureau orders issued pursuant to delegated authority. In other words, they relied on the law, and they were correct to do so.³⁷

The list could go on. In short, the Commission simply should not be persuaded by the AFR given its inaccuracies.

V. THE OBJECTIONS RAISED BY IPR ACTUALLY REPRESENT REQUESTS TO CHANGE COMMISSION RULES AND POLICIES AND ARE PROPERLY DEALT WITH IN A RULEMAKING PROCEEDING.

By repeating objections to components of the transaction that comply with Commission rules and policies, the AFR shows that IPR's goal is to achieve policy change. The AFR further demonstrates IPR's policy focus by addressing other, unrelated transactions with respect to which IPR also has policy objections. Specifically, it describes in detail applications for review in other, unrelated proceedings; quotes general policy statements by a member of Congress; and describes studies with respect to unrelated transactions.³⁸

The Commission properly addresses requests for policy change in the rulemaking context. As the Supreme Court has stated and the Commission has recognized, "rulemaking is generally a better, fairer, and more effective method of implementing a new industry-wide policy than is the uneven application of conditions in isolated license[-related] proceedings."³⁹ The Court of Appeals for the D.C. Circuit, too, has recognized the impropriety of seeking to apply

³⁷ Cf. *AT&T Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) ("Judicial hackles are raised when an agency [through adjudication] alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates.").

³⁸ See AFR at 3-5, 14, 16-17.

³⁹ *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1983) (internal quotation marks omitted); see also *Great Empire Broadcasting, Inc. and Journal Broadcast Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 11145, 11148 (1999); *Stockholders of Renaissance Communications Corp. and Tribune Co.*, Memorandum Opinion and Order, 12 FCC Rcd 11866, 11887-88 (1997).

new requirements in the context of licensing proceedings, highlighting the “arbitrariness of retroactive application and the inherent constraints of the adjudicatory process.”⁴⁰ Given the broad public interest impact and disruption that would be caused by a change to the attribution standards, a rulemaking is the appropriate forum in which to address requests for change to those standards.⁴¹

* * *

This simply is not the appropriate forum for IPR to seek changes to the Commission’s ownership and attribution rules, and the Commission should not accept its request to do so at the expense of the parties and the public. Accordingly, and for the reasons set forth above, the Commission should deny or dismiss the AFR.

⁴⁰ *California Ass 'n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88, 96-97 (D.C. Cir. 1988).

⁴¹ Broadcasters have amply demonstrated that sharing arrangements serve the public interest by enabling broadcasters to create operational benefits in order to provide new or expanded local news and other programming and benefits to their communities. *See, e.g.*, Comments of the National Association of Broadcasters, MB Docket No. 09-182, MB Docket No. 07-294, at 57-69 (Mar. 5, 2012).

Respectfully submitted,

GANNETT CO., INC.

A handwritten signature in black ink, appearing to read "Daniel Kahn". The signature is fluid and cursive, with a long horizontal stroke at the end.

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February 6, 2014

CERTIFICATE OF SERVICE

I, Daniel Kahn, an attorney at Covington & Burling LLP, hereby certify that on this 6th day of February, 2014, I caused a copy of this Opposition to Application for Review to be served by U.S. First Class mail, postage prepaid, with a courtesy copy by e-mail, upon the following:

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