Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

REPLY TO OPPOSITION TO 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, respectfully reply to the Oppositions filed by Gannett Co., Inc. ("Gannett"), Tucker Operating Co. LLC ("Tucker"), and Sander Media, LLC ("Sander") (collectively "Opposing Parties" or "Oppositions"), on February 6, 2014.

The Oppositions do not dispute the fundamental factual and legal allegations in the Application for Review. Instead, they argue that the Commission lacks authority to address these claims in the current adjudicatory proceeding, and Gannett maintains that it is entitled to rely on the Media Bureau's past decisions.

I. The Commission Can and Should Grant the Relief Requested in the Application for Review

The Commission does not need to institute a rulemaking proceeding in order to address whether parties may use shared service agreements ("SSAs") to evade the newspaper-broadcast cross-ownership ("NBCO") rule. Rather, it may so rule in this adjudication, contrary to the Opposing Parties' claims that the Commission may not change existing policy or practice through this forum.[1]

[1] Gannett Opp., at 10; Tucker Opp., at 6; Sander Opp., at 13.

It is black letter law that the Commission may establish policy—and has done so—through adjudication. Indeed, the Supreme Court most recently affirmed this principle in *FCC v. Fox Television Stations*. There, the Court found that the FCC's broad policy changes to its rules regarding expletives, enacted through an adjudication, were a proper exercise of its adjudicatory authority and did not violate the Administrative Procedure Act.[2] Furthermore, courts have consistently held that agencies have broad discretion in deciding whether to address an issue by adjudication or rulemaking; in more than one case, courts have noted that such agency discretion is "at its peak."[3]

None of the cases cited in the Oppositions hold to the contrary. In *NLRB v. Wyman-Gordon Co.*, cited by Sander,[4] the Supreme Court explained that there was "no question that, in an adjudicatory hearing, the Board could validly decide the issue" and that "[a]djudicated cases may and do, of course, serve as vehicles for the formulation of agency policies."[5] Similarly, in *AT&T v. FCC*, cited by Gannett,[6] the D.C. Circuit stated that "courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct."[7] Indeed, the D.C. Circuit in that case affirmed the Commission's adjudicative action. Finally, Tucker's citation to *U.S. Telecom Ass'n v. FCC* is wholly inapposite because that case did not involve an adjudication; it concerned only whether notice and comment provisions apply to interpretative policy statements.[8] At any rate, the D.C. Circuit there noted that notice

---

[2] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 520 (2009).
[3] *See, e.g., Shays v. Fed. Election Comm'n*, 511 F. Supp. 2d 19, 26 (D.C. Cir. 2007); *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1519 (D.C. Cir. 1990); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007).
[4] Sander Opp., at 13.
[5] 394 U.S. 759, 765 (1969).
[6] Gannett Opp., at 10.
[7] 454 F.3d 329, 332 (D.C. Cir. 2006).
[8] Tucker Opp., at 6.

and comment procedures do not apply to certain adjudications, signaling its knowledge that the Commission may proceed either through rulemaking or adjudication.[9]

II. Any Possible Reliance That Gannett May Have Does Not Prevent the Commission from Granting the Requested Relief

Gannett claims that it properly "relied on the Communications Act, Commission rules, Commission orders, and Bureau orders issued pursuant to delegated authority."[10] However, reliance interests are particularly weak when parties rely on staff decisions that the Commission has not yet reviewed, and in any event, the reliance interests in this case are outweighed by strong public interest concerns.

A. Parties Proceed at Their Own Risk When They Rely on Staff Decisions That the Commission Has Not Adopted or That Are Pending Review

Gannett claims that it relied on the Communications Act, Commission rules, and Commission precedent, but none of these specifically address the question of whether SSAs can be used to circumvent the NBCO rule. Rather, the full Commission has only heard one case regarding modern sharing agreements, *Ackerley*, which dealt with the local TV ownership rules, not the NBCO rule. Moreover, *Ackerley* supports overturning the Bureau's decision here.[11]

The Opposing Parties' reliance interests are extremely limited because staff decisions are not binding precedent on the Commission when the Commission has not reviewed the staff ruling.[12] The D.C. Circuit has emphasized that a subordinate body of an agency cannot bind the decision-making of the agency.[13] Here, the Commission has never considered, much less

---

[9] 400 F.3d 29, 34 n.9 (D.C. Cir. 2005).

[10] Gannett Opp., 9-10.

[11] *Application for Consent to Assignment of Broadcast Station Licenses from Belo Corp. to Gannett Co., Inc., Sander Operating Co., and Tucker Operating Co.,* Application for Review, MB Docket 13-189, at 2, 12, 17 (Jan. 22, 2014) (citing *Shareholders of the Ackerley Group, Inc.*, 17 FCC Rcd 10828 (2002)).

[12] *Edwin Edwards, Sr.*, 16 FCC Rcd 22236, 22250 (2001).

[13] *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

affirmed, the Bureau's previous decisions on SSAs, even though applications for review were filed and are pending. Where the Commission has not reviewed staff decisions, it is improper to substitute the Bureau's position for that of the Commission.[14]

Gannett and Sander attempt to portray the absence of Commission action as an affirmative endorsement of the Bureau's approach.[15] But silence in no way indicates approval; by way of comparison, when the Supreme Court denies *certiorari*, it does not implicitly affirm the lower court's decision. Not only would this approach turn logic on its head, but it would also ignore the functional realities of the Commission, where years may pass before the Commission reviews a staff decision. It would make little sense for inaction to constitute Commission approval. Instead, until the Commission issues a decision on whether broadcasters may subvert the Commission's rules via sharing agreements, reliance interests on previous Bureau decisions—whether pending review or unchallenged—are weak.

Moreover, parties are on notice that staff decisions may be reversed when those decisions are pending Commission review. The Commission has consistently warned that when parties rely on such staff decisions, they assume the risk of any consequences that result from reversal.[16] Thus, if any reliance interests exist in this case, they are very limited. Additionally, to the extent

---

[14] *See Comcast*, 526 F.3d at 769 (standing for this proposition when staff decisions went unchallenged, preventing the court from knowing how the Commission would have ruled); *Edwards*, 16 FCC Rcd at 22250 (standing for this proposition when staff decisions have been challenged, but not yet reviewed by the Commission).

[15] Gannett Opp., at 5; Sander Opp., at 8.

[16] *See Application of Nationwide Wireless Network Corp.*, 13 FCC Rcd 12914, 12920 (1998) (finding that the party was on notice that the issue might be decided against it because it was precisely the issue raised by petitioners who opposed the party's application); *Applications of Gen. Tel. Co. of California*, 8 FCC Rcd 8753, 8754 (1993) (reasoning that the petitioner had been on notice that it "necessarily assume[d] the risk that if the Bureau's decision is reversed, it may have to undo, at some cost and inconvenience to itself, actions it took in reliance on that decision"); *Applications of Spanish Int'l Commc'ns Corp.*, 3 FCC Rcd 4319, 4321 (1988) (noting that, when parties close a transaction before administrative or judicial review of the staff decision, they proceed with the understanding that they may ultimately be required to undo the transaction).

that the Commission's proper exercise of its authority to reverse staff decisions might upset regulatory certainty, strong public interest concerns outweigh that potential effect, as discussed below.

B. Strong Public Interest Concerns Outweigh Weak Reliance Interests

The Commission has held that public interest concerns can override even strong reliance interests.[17] As already explained, the Opposing Parties' reliance interests are very weak because the relied-on decisions are staff decisions, many of which are pending full Commission review. Moreover, reliance interests are at a minimum when parties rely on cases that arose under distinguishable circumstances. The Oppositions rely on Bureau decisions that involved SSAs in the context of the local television rule, not the NBCO rule, and it is undisputed that the two rules serve different goals. Because the Commission designed the rules for different purposes, and these transactions undermine those different purposes in different ways, the Opposing Parties' reliance on cases involving rules other than the NBCO rule is inapposite.

Any reliance interests here are thus very limited. By contrast, there are very strong public interest concerns involved.[18] The Opposing Parties' SSAs harm the public interest in at least three ways. First, they reduce the diversity of viewpoints available to viewers in the affected markets by eliminating independent sources of local television news. For example, the SSAs reduce the number of independent television voices from six to five in the Louisville, KY

---

[17] *Nationwide Wireless*, 13 FCC Rcd at 12920 (finding that the strong public interest reason of preserving parallel treatment among narrowband PCS licenses outweighed reliance interests); *Review of the Pioneer's Preference Rules*, 9 FCC Rcd 4055, ¶36 (1994) (finding that the strong public interest concerns of preventing distortion of a fair system of competitive bidding outweighed reliance interests).

[18] It is true that any regulatory certainty that presently exists is a public interest benefit. However, regulatory certainty is not the only relevant public benefit, and it should not be overstated. There are detriments to regulatory certainty—most notably that it precludes review of specific facts, impacts, and incentives in transactions.

and Tucson, AZ markets, and from eight to seven in the Portland, OR market.[19] In each of these markets, Gannett already owns a major daily newspaper—in Louisville and Tucson, it owns the only major newspaper available, and in Portland, it owns one of just three major newspapers.[20] The SSAs thus result in fewer independent voices covering local news and greater content overlap between television and newspaper coverage.

Second, the size of each of the markets further exacerbates the negative effect on diversity and the public interest created by eliminating even one source of independent news. A small number of news sources currently provides local coverage to each of the markets: five independent television stations in Louisville and Tucson, and seven in Portland. Yet every one of these markets serves a large, diverse population, requiring greater independent coverage. As a result of the Opposing Parties' SSAs, however, just five independent news voices reach 440,000 households in the Tucson market, and 670,000 households in the Louisville market.[21] Even worse, the Portland market encompasses 1.18 million households that are limited in their options to just seven independent sources of television news.[22] The SSAs in each of these markets deprive large news-consuming populations of the diversity in viewpoints and programming that best informs local communities.

Finally, the SSAs provide for extensive sharing of resources and personnel, among other services. The loss of jobs held by community members is an inevitable side-effect of these cost-saving measures. Already, staff layoffs have occurred due to the SSA in the Tucson market, where the Gannett transaction enabled the consolidation of newsrooms, staff, and journalists.[23]

---

[19] *Application for Consent to Assignment of Broadcast Station Licenses from Belo Corp. to Gannett Co., Inc., Sander Operating Co., and Tucker Operating Co.*, Petition to Deny, MB Docket 13-189, at 20, 23, 28 (July 24, 2013).
[20] *Id.* at 19, 23, 27.
[21] *Id.* at 19, 23.
[22] *Id.* at 27.
[23] *Id.* at 26.

The SSAs in Louisville and Portland similarly provide for shared office space and require that Sander hire just one managerial employee to run the stations.[24] Layoffs in Louisville and Portland, which impacts localism, will likely follow this collapse of two operations into one, just as they did in Tucson. In turn, the diversity of viewpoints, localism, and quality of news coverage in each market will further suffer as individual journalistic voices fall out.

Serious public interest concerns regarding diversity accompany the Opposing Parties' SSAs, and the importance of the public interest in the Commission's regulation of media ownership indicates that these strong concerns outweigh the Opposing Parties' weak reliance interests.

Conclusion

Review of a proposed transfer is always case-specific, and the applicants bear the burden of showing that grant of the application is in the public interest. The Opposing Parties have failed to meet that burden. For this and the foregoing reasons, the full Commission should review and reverse the Bureau's decision.

[24] *Id.* at 22, 29.

Respectfully submitted,

/s/

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

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

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

Catherine M. Yang
Georgetown Law Student

Dated: February 19, 2014

Certificate of Service

I, Eric Null, hereby certify that copies of the Reply to the Opposition to 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 19th of February, 2014, on the following persons at the addresses shown below.

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

John Feore
Jason E. Rademacher
Cooley LLP
1299 Pennsylvania Avenue, NW, Suite 700
Washington, DC 20004
jfeore@cooley.com
Counsel for Tucker Operating Co. LLC

Jennifer A. Johnson
Eve R. Pogoriler
Daniel H. Kahn
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
jjohnson@cov.com
Counsel for Gannett Co., Inc.

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

CC (by email):
William Lake
Barbara Kreisman
David Roberts
Gigi Sohn
Maria Kirby
Adonis Hoffman
Clint Odom
Matthew Berry
Courtney Reinhard

/s/
Eric Null