IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

14-1072

Case No. 14-_____

PETITION FOR REVIEW

Pursuant to Section 402(a) of the Communications Act of 1934, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342-44, and Rule 15(a) of the Federal Rules of Appellate Procedure, the National Association of Broadcasters ("NAB")[1] hereby petitions this Court for review of *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, Public Notice, 2014 WL 988647 (Mar. 12, 2014) ("Public Notice"). A copy of the Public Notice is

[1] NAB is a nonprofit trade association that advocates for free local television and radio stations and broadcast networks before Congress, the Federal Communications Commission and other agencies, and the courts.

attached to this Petition as Exhibit A. Venue lies in this Court pursuant to 28 U.S.C. § 2343.

The Public Notice adopts a categorical presumption against certain broadcast television transactions involving sharing arrangements and contingent or other financial interests. In doing so, it abandons longstanding precedent of the Federal Communications Commission ("Commission") *sub silentio* and creates inconsistency with pre-existing and subsequently adopted Commission rules. Specifically, the Public Notice provides that broadcast assignment and transfer applications proposing that two or more stations in the same broadcast market will enter into arrangements "to share facilities, employees, and/or services or to jointly acquire programming or sell advertising," and "[e]nter into an option, right of first refusal, put/call arrangement, or similar contingent interest, or a loan guarantee," will now trigger stringent Commission "scrutin[y]." Public Notice at *2.

This categorical presumption against the covered transactions operates as a practical prohibition that adversely affects NAB and the member broadcasters whose interests it represents by rendering previously legitimate transactions presumptively invalid under the Commission's media ownership rules. *Compare, e.g.*, Public Notice at *2 (describing stringent "scrutin[y]" for sharing arrangements that include "option[s]"), *with* 47 C.F.R. § 73.3555 Note 2e ("holders of debt and instruments such as warrants, convertible debentures, *options* or other non-voting

interests with rights of conversion to voting interests *shall not be attributed unless and until conversion is effected*") (emphases added). It is also inconsistent with subsequently adopted Commission rules and statements pertaining to broadcast sharing agreements. *See Further Notice of Proposed Rulemaking and Report and Order*, FCC 14-28, 2014 WL 1466887, at ¶¶ 327, 329, 340, 364 (Apr. 15, 2014). NAB actively participated below and repeatedly raised its objections to the Public Notice, both procedural and substantive, and requested that the Commission direct the Media Bureau to withdraw the document and immediately cease and desist in its application.[2]

NAB now seeks relief from the Public Notice on the grounds that: (1) it adopts legislative rules in violation of the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; (2) it is arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706; (3) it is in excess of the Media

---

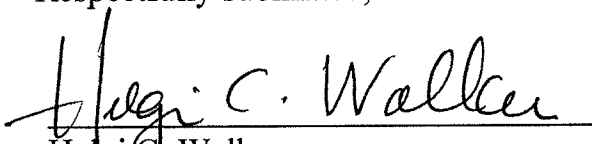
[2] The Public Notice constitutes final agency action subject to judicial review because it "mark[s] the consummation of the [Commission's] decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks omitted). NAB's requests for withdrawal of the Public Notice and cessation of its application were to no avail; any further efforts would be futile. The strict scrutiny standard set forth in the Public Notice has significant and immediate legal consequences for broadcasters subject to Commission regulation, especially those with pending applications covered by the Public Notice, for the reasons given above. *See, e.g., Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 92-96 (D.C. Cir. 1986); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 & n.7, 436 (D.C. Cir. 1986).

Bureau's delegated authority under 47 C.F.R. § 0.283; and (4) it is otherwise contrary to law.

Accordingly, NAB requests that this Court hold unlawful, vacate, and set aside the Public Notice and grant such additional relief as may be necessary and appropriate.

Dated: May 12, 2014

Respectfully submitted,



Helgi C. Walker
Counsel of Record
Ashley S. Boizelle
Lindsay S. See
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

Attorneys for Petitioner National Association of Broadcasters

Jane E. Mago
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 429-5430

Exhibit A

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

DA 14-330
Released: March 12, 2014

PROCESSING OF BROADCAST TELEVISION APPLICATIONS PROPOSING SHARING ARRANGEMENTS AND CONTINGENT INTERESTS

In recent months, the Media Bureau has reviewed an increasing number of proposed broadcast television transactions involving both agreements to share facilities, employees, and/or services of various types between stations and financing and/or contingent interest agreements involving those stations. These arrangements have drawn substantial public scrutiny. We issue this Public Notice to provide guidance concerning the Bureau's processing of applications seeking Commission approval of proposed transactions that involve combinations of sharing arrangements and contingent or financial interests.

Background

In its recent order approving the transfer of control of Belo Corp. to Gannett Co., Inc. and the related assignment of certain Belo broadcast television licenses to Sander Media Co., LLC and Tucker Operating Co., LLC, the Bureau stressed that "Congress' express statutory command is that license transfers must satisfy the 'public interest, convenience, and necessity,' a standard that is always informed by regulatory standards, but which necessarily involves, as our licensing decisions have long noted, the use of a "case-by-case" approach... [A]pplicants 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."[1]

We have previously recognized that sharing arrangements and related transactional features may raise issues pertinent to our review of the economic effects of a transaction and the incentives it creates. For example, in a 2002 decision reviewing transfer applications, the Commission carefully scrutinized the agreements and sharing arrangements between a licensee and a broker to determine whether they would result in attribution of an ownership interest in the station to the broker because they deprived the licensee of the financial incentive to control the station's programming.[2] In the *2010 Quadrennial Review NPRM*, the Commission asked a number of questions about the incidence and impact of sharing arrangements and their relationship to our broadcast ownership rules.[3]

---

[1] *Shareholders of Belo Corp.*, Memorandum Opinion and Order, DA 13-2423 (MB rel. Dec. 20, 2013), at ¶¶ 29, 30.

[2] *Shareholders of Ackerley Group, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 10828, 10841 (2002).

[3] *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rule and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011), *subs. hist. omitted.*

In our ongoing review of proposed transactions involving sharing arrangements, we have identified a concern that a broadcaster that has entered into a sharing arrangement with another same-market station in which it also has a contingent financial interest, such as an option to purchase the station or as a guarantor of the other station's financing, may obtain a degree of operational and financial influence that deprives the licensee of the second station of its economic incentive to control programming. For example, an assignable option to purchase a station at less than fair market value may counter any incentive the licensee has to increase the value of the station, since the licensee may be unlikely to realize that increased value. Also, the compensation provisions of agreements to share facilities and employees, to jointly sell advertising, and to jointly acquire programming, can be structured such that the licensee of the station bears little or none of the risks and reaps little or none of the rewards for the performance of the station. While each case must be judged on its individual facts, we have determined that proposed combinations of such sharing arrangements and contingent financial interests warrant careful scrutiny in our review of applications.

Processing Guidance

Accordingly, recognizing the time-sensitive nature of proposed transactions for which our approval is sought, we provide this guidance. In reviewing broadcast assignment and transfer applications going forward, including those currently before us, the Bureau will closely scrutinize any application that proposes that two (or more) stations in the same market will:

> (1) Enter into an arrangement to share facilities, employees, and/or services or to jointly acquire programming or sell advertising, including a Joint Sales Agreement (JSA), a Local Marketing Agreement (LMA), or any other agreement or arrangement (written or oral) that would have the same practical operational or financial effect as any of these agreements,
>
> and
>
> (2) Enter into an option, right of first refusal, put/call arrangement, or other similar contingent interest, or a loan guarantee.

We will evaluate how any such arrangements operate and the incentives they create, and not how they are styled by the applicants.

Each applicant bears the burden of showing that approval of its proposed transaction will be consistent with the public interest, convenience, and necessity. Therefore, in the situations described above, each applicant must provide sufficient information and documentation to *fully* describe its proposed transaction, including any side agreements, and establish that it is an arm's-length transaction and would not impair the existing licensee's control over station operations and programming, result in attribution of the relationship, or be otherwise contrary to the public interest. While every transaction is evaluated individually, we note that in past transactions we have seen certain circumstances that raise particularized issues that we must review. For example, we will consider whether, in a specific transaction, financial influence inheres in lending relationships as well as in the contingent interests mentioned above. In particular, we will consider carefully the potential implications for application of the public interest standard of a circumstance in which a proposed assignee/transferee shares the same lending institution as an in-market broadcaster with which it has a sharing arrangement, and a portion of the purchase price will be financed by a loan from that lending facility and the loan is not made at arm's-length. The same assessment will need to be made where an applicant proposes to sell license assets and non-license assets of a station to different parties and the facts available to the Media Bureau seem to suggest that the purchase prices for the license assets and the non-license assets do not reflect their fair market values and the transaction is not truly at arm's-length. We remind applicants of their required certifications in their applications that the agreements placed in the station public file and submitted to the

Commission embody the complete and final understanding between the parties and that these agreements comply fully with the Commission's rules and policies.[4] Consistent with that obligation, applicants must submit all such documentation that is a part of their proposed transaction relevant to the Commission's review of their application, as described in this Public Notice. Pursuant to Section 308(b) of the Act and Section 73.3514 of the Commission's rules, if an application seeking approval of a proposed transaction does *not* provide sufficient information for us to fully evaluate whether it would serve the public interest, the applicants may be asked to provide additional information or documents,[5] and our consideration of the application will be delayed while we await that information.

We issue this guidance to apprise broadcasters and their representatives of some of the factors the Bureau will consider in exercising its responsibility to review proposed assignments or transfers of control of broadcast licenses pursuant to the Communications Act, Commission rules, and relevant Commission precedent. Of course, we will continue to review the overall economic effects of, and incentives created by, proposed transactions in determining whether they serve the public interest.

This action is taken by the Chief, Media Bureau, pursuant to authority delegated by 47 C.F.R. § 0.283 of the Commission's rules.

For additional information, please contact David Brown (202-418-1645; david.brown@fcc.gov). Press inquiries should be directed to Janice Wise (202-418-8165; janice.wise@fcc.gov).

---

[4] *See* FCC Form 314, Section II, Item 3, Section III, Item 3; FCC Form 315, Section III, Item 3, Section IV, Item 5.

[5] 47 U.S.C. § 308(b); 47 C.F.R. §73.3514(b) ("The FCC may require an applicant to submit such documents and written statements of fact as in its judgment may be necessary. The FCC may also, upon its own motion or upon motion of any party to the proceeding, order the applicant to amend the application so as to make it more definite and certain."). *See also,* 47 C.F.R. § 1.65(a); *LUJ, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 16980, 16982-16983 (2002).

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

14-1072

Case No. 14-_____

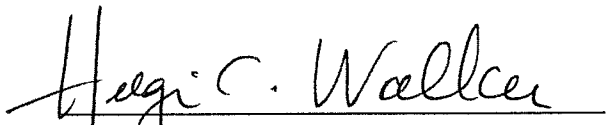
CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Petitioner National Association of Broadcasters ("NAB") states as follows:

NAB is a nonprofit, incorporated association of radio and television stations. It has no parent company, and has not issued any shares or debt securities to the public; thus no publicly-held company owns ten percent or more of its stock. As a continuing association of numerous organizations operated for the purpose of promoting the interests of its membership, the coalition is a trade association for purposes of D.C. Circuit Rule 26.1.

Dated: May 12, 2014

Respectfully submitted,



Helgi C. Walker
Counsel of Record
Ashley S. Boizelle
Lindsay S. See
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

Attorneys for Petitioner National Association of Broadcasters

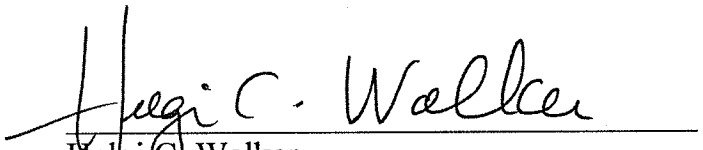
Jane E. Mago
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 429-5430

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Review and Corporate Disclosure Statement have been served via first-class mail, postage prepaid, this 12th day of May, 2014, upon the following parties:

Jonathan Sallet
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001



Helgi C. Walker
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036