

**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 Media, LLC and Tucker Operating)
Co. LLC)

To: The Chief, Media Bureau

OPPOSITION TO APPLICATION FOR REVIEW

Tom Chauncey
Gust Rosenfeld, P.L.C.
1 East Washington Street
Suite 1600
Phoenix, AZ 85004-2533

Richard E. Wiley
James R. Bayes
Eve K. Reed
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000

February 6, 2014

Counsel for Sander Media, LLC

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY2

II. THE APPLICATION FOR REVIEW PRESENTS NO VALID BASIS FOR REVIEW OR REVERSAL OF THE BUREAU’S ORDER.4

 A. The Bureau Correctly Concluded that the Assignments of the Stations Complied Fully With Applicable Rules and Precedent and Would Serve the Public Interest.4

 1. In Granting the Applications, the Bureau Correctly Relied on the Current Attribution Rules, Under Which Television Joint Sales Agreements (“JSAs”) and other Services Agreements Do Not Give Rise to Attribution.4

 2. The Agreements for the Stations Are Consistent with Bureau Guidelines for Non-Attributable Television JSAs and SSAs as well as Relevant Commission-Level Precedent..... 6

 3. The Bureau Independently Considered and Correctly Analyzed the Public Interest Benefits of Granting the Applications.9

 4. The Bureau Gave Appropriate Weight to the Stated Concerns of the Department of Justice (“DOJ”)..... 10

 B. The Application for Review Does Not Present a “Novel Question” Warranting Commission Review..... 11

 C. Granting Free Press the Relief It Seeks in this Proceeding Would Violate the APA and Due Process Requirements. 12

III. CONCLUSION 14

**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 Media Co., LLC and Tucker)
Operating Co. LLC)
)
To: The Chief, Media Bureau

OPPOSITION TO APPLICATION FOR REVIEW

The Sander Operating Companies (“Sander”),¹ by their attorneys and pursuant to Section 1.115 of the rules of the Federal Communications Commission (“FCC” or “Commission”), hereby submit this Opposition to the Application for Review filed January 22, 2014, by Free Press, NABET-CWA, TNG-CWA, National Hispanic Media Coalition, Common Cause, and Office of Communication, Inc. of the United Church of Christ (collectively, “Free Press”). Free Press contends that the full Commission should review and reverse the Media Bureau’s grant in the *Order*² of applications for the assignments of television stations in Louisville, Kentucky; Portland, Oregon; and Tucson, Arizona from subsidiaries of Belo Corp. (“Belo”) to Sander and

¹ The Sander Operating Companies include Sander Operating Co. I LLC (d/b/a WHAS Television), Sander Operating Co. II LLC (d/b/a KTVK Television), Sander Operating Co. III LLC (d/b/a KGW Television), Sander Operating Co. IV LLC (d/b/a KMOV Television), and Sander Operating Co. V LLC (d/b/a KMSB Television).

² *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc.; Applications for Consent to Assignments of Licenses from Subsidiaries of Belo Corp. to Subsidiaries of Sander Media, LLC and Tucker Operating Co., LLC*, Memorandum Opinion and Order, MB Docket No. 13-189 (rel. Dec. 20, 2013) (“*Order*”).

to Tucker Operating Co., LLC (“Tucker”).³ As demonstrated below, the Bureau appropriately found that grant of the Applications complies with all applicable FCC rules and policies and will serve the public interest. Accordingly, there is no basis for disturbing the Bureau’s *Order*.

I. INTRODUCTION AND SUMMARY

Free Press seeks reversal of the *Order* based primarily on its unsupported assumption that the Shared Services Agreements (“SSAs”) between Sander and Gannett in Portland, Oregon and Louisville, Kentucky, and agreements relating to the Sander and Tucker Stations in Tucson, Arizona, will impermissibly reduce diversity and competition in those markets because Gannett publishes newspapers in Salem, Oregon,⁴ Louisville, and Tucson. In attempting to satisfy the procedural requirements for applications for review, Free Press reveals its real motive: to obtain, on review of this adjudicatory licensing proceeding, action on possible rule changes that the FCC is considering – and can only lawfully resolve – in separate rulemaking proceedings.

Free Press’s substantive allegations lack merit. The Bureau properly found that Sander at all times will retain appropriate control over, and incentives to independently ensure the success

³ See FCC File Nos. BALCDT-20130619AFM (WHAS-TV); BALCDT-20130619AFN (KGW(TV)); BALCDT-20130619AFL (KMSB(TV)); BALCDT-20130619ADJ (KTTU(TV)) (the “Applications”). The four stations that were the subject of the Applications are referred to herein as the “Stations,” and the three licensed to Sander – WHAS-TV, KGW(TV), and KMSB(TV) – as the “Sander Stations.” The *Order* also granted (1) applications for assignment of television stations KTVK(TV) and KASW(TV), Phoenix, Arizona and KMOV(TV), St. Louis, Missouri from Belo subsidiaries to Sander; and (2) a series of applications for transfer of control of subsidiaries of Belo to Gannett Co., Inc. (“Gannett”). See *Order* ¶¶ 3-7. It should also be noted that Sander has since filed applications to assign KMOV(TV) to Meredith Corporation (“Meredith”), to assign KTVK(TV) to a Meredith subsidiary, and to assign KASW(TV) to SagamoreHill of Phoenix Licenses, LLC, which remain pending. See FCC File Nos. BALCDT-20131231ADY, BALCDT-20131231ADQ, BALCDT-201311231ADN.

⁴ Although Gannett’s ownership of the *Statesman Journal* newspaper in Salem would preclude it from owning KGW(TV) under the newspaper/broadcast cross-ownership rule, it bears mention that Salem is located approximately forty miles from Portland. Moreover, Portland is served by its own daily newspaper, *The Oregonian*, which Gannett does not own.

of, the Sander Stations. The Bureau also fully addressed, and rightly rejected, Free Press's contentions that the assignments of the Stations would disserve the public interest, and that the transactions presented "novel" questions because they involved markets in which Gannett publishes daily newspapers instead of owning television stations. Moreover, Free Press cannot lawfully obtain the widespread revision of the Commission's attribution rules that it seeks in this proceeding. To the contrary, the Administrative Procedure Act ("APA") and principles of due process require the FCC to address arguments in favor of broad change to those rules in the context of notice and comment rulemaking. Finally, Sander notes that the Application for Review specifically mentions only the assignments of WHAS-TV, KGW(TV), and KMSB(TV) to Sander, and of KTTU(TV) to Tucker.⁵ By insufficiently addressing the remaining applications at issue in the *Order*, Free Press has failed to preserve a challenge to their grant.⁶ In all events, the Commission should deny the Application for Review, as Free Press has failed to establish any basis for disturbing the Bureau's *Order*.

⁵ See Application for Review at 8 ("[T]he only remaining markets at issue in this transaction are Portland, OR; Tucson, AZ; and Louisville, KY.").

⁶ See, e.g., *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1311-12 (D.C. Cir. 2010). To the extent necessary, however, Sander opposes the Application for Review with respect to the *Order* in its entirety. In addition, Sander has focused in this Opposition on the Application for Review as it applies to the Sander Stations and supports, and to the extent necessary incorporates herein, the arguments raised by Gannett and Tucker in their oppositions, which are also filed today.

II. THE APPLICATION FOR REVIEW PRESENTS NO VALID BASIS FOR REVIEW OR REVERSAL OF THE BUREAU'S ORDER.

A. The Bureau Correctly Concluded that the Assignments of the Stations Complied Fully With Applicable Rules and Precedent and Would Serve the Public Interest.

1. In Granting the Applications, the Bureau Correctly Relied on the Current Attribution Rules, Under Which Television Joint Sales Agreements (“JSAs”) and other Services Agreements Do Not Give Rise to Attribution.

The Bureau correctly applied the current broadcast attribution rules in processing and approving the Applications. Over many years and in many decisions, the Commission has carefully considered, and sometimes fine-tuned, those rules to craft detailed standards which govern the types of interests conferring a sufficient degree of influence or control that they are relevant to compliance with the multiple- and cross-ownership rules.⁷ The current rules address certain sharing arrangements, but provide for attribution only where the owner of a television station brokers more than 15 percent of the weekly broadcast time of another station in the same market.⁸ This is true whether or not an agreement involves the provision of news,⁹ and the Bureau properly found that none of the agreements involving the Stations are attributable under the existing rules.¹⁰ Likewise, the FCC has considered on numerous occasions whether to treat

⁷ Order ¶ 26; see, e.g., *Review of The Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559 (1999), *subsequent hist. omitted*; *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *on recon.*, 58 RR 2d 604 (1985), *on further recon.*, 1 FCC Rcd 802 (1986).

⁸ 47 C.F.R. §73.3555, Note 2(j)(ii).

⁹ See Application for Review at 10, 12.

¹⁰ See Order ¶ 26 (“SSAs typically do not raise an issue under the Commission’s attribution rules.”).

options and other future interests as attributable¹¹ and, as the Bureau correctly noted in rejecting Free Press’s arguments below, decided that such interests are not cognizable unless and until exercised.¹²

Although there have been *proposals* to change the rules to make additional services arrangements attributable, none has been adopted. For example, in 2003, the FCC considered adopting a rule that would have made JSAs between same-market television stations attributable, but it did not do so.¹³ Instead, the agency initiated a separate rulemaking on the subject, which remains unresolved.¹⁴ The Commission also requested comments on the possible attribution of certain types of services agreements in the 2010 Quadrennial Review.¹⁵ In that proceeding, Free Press and others have argued in favor of attributing television JSAs and SSAs,¹⁶ but the FCC has yet to issue an order addressing their contentions.

¹¹ Cf. Application for Review at 7, 12, 14, 15 n.54 (emphasizing Sander’s grant to Gannett of options to purchase the Stations).

¹² *Order* ¶ 26; see 47 C.F.R. § 73.3555, Note 2(e). As the Bureau noted, such interests may be relevant in the context of the equity-debt-plus (“EDP”) attribution standard, but that standard is not implicated here. *Order* ¶ 26 (citing *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order on Reconsideration, 16 FCC Rcd 1097, 1112 (2001)).

¹³ *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13743 n.688 (¶ 317 n.688) (2003).

¹⁴ *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238 (2004) (“*2004 TV JSA NPRM*”).

¹⁵ *2010 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, 17564-65, 17569-70 (¶¶ 195, 204-08) (2011).

¹⁶ See, e.g., Comments of Office of Communication, Inc. of United Church of Christ, MB Docket No. 09-182 (Mar. 5, 2012), at i, 1-23 ; Comments of Free Press, MB Docket No. 09-182 (July

2. The Agreements for the Stations Are Consistent with Bureau Guidelines for Non-Attributable Television JSAs and SSAs as well as Relevant Commission-Level Precedent.

Apart from considering compliance with the FCC's attribution rules, the Bureau evaluated the specific agreements involving the Stations within the framework of existing precedent, and properly found that the agreements fell comfortably within the boundaries of previously approved transactions. Although Free Press takes issue with the *Order's* reliance on Bureau-level decisions,¹⁷ this objection is misplaced. The Bureau-level decisions cited in the *Order* represent straightforward applications of the Commission's attribution rules, discussed above. In carefully reviewing the transactions approved by the cited decisions, the Bureau examined the very issues of control and incentives that Free Press emphasizes, and delineated the permissible boundaries for parties wishing to structure sharing agreements without giving rise to attribution.¹⁸ The Bureau properly found that the agreements with respect to the Stations fall well within those boundaries, and Free Press does not seriously contend otherwise.¹⁹ Instead,

12, 2010), at ii, 9-13; Comments of Communications Workers of America, The Newspaper Guild/CWA, and National Association of Broadcast Employees and Technicians/CWA, MB Docket No. 09-182 (July 12, 2010), at iv-vi, 19-25.

¹⁷ See, e.g., Application for Review at 10-12, 16.

¹⁸ *Order* ¶¶ 27-28 & nn.81-85 (citing cases). In addition, the Bureau began its discussion of Free Press's arguments by explaining the factors that it considers, pursuant to Commission-level precedent, in determining whether another party has obtained *de facto* control over a licensee. *Id.* ¶ 25. These factors informed the Bureau's entire analysis.

¹⁹ Free Press incorrectly claims that the *Order* is the first ever to permit a licensee to maintain "one employee." Application for Review at 5 n.11. However, the agreements with respect to the Sander Stations require Sander to maintain *at least* one managerial employee, and a sufficient number of employees overall to comply with Commission rules. See Form of Shared Services Agreement, § 3.1 (attached as an exhibit to the Applications). This arrangement is consistent with not just Bureau precedent, but Commission precedent as well. See, e.g., *Shareholders of Ackerley Group, Inc.*, 17 FCC Rcd 10828, ¶¶ 30, 32 (2002); see also *Order* ¶ 29 & n.85 (citing cases).

Free Press effectively seeks a reversal of those earlier decisions, arguing that rather than applying existing precedent based on clear-cut rules, the Bureau should have manufactured new standards and applied them in this proceeding.

Although Free Press claims the Bureau decision “evinces a serious misunderstanding of” certain Commission-level precedent,²⁰ the Bureau thoroughly considered that precedent and properly applied it.²¹ In *Shareholders of Ackerley Group, Inc.*, the full Commission found that agreements under which a broker programmed less than 15 percent of a station’s programming, but kept all of the station’s advertising revenue, should be attributable because the licensee lacked the incentive to control the remaining programming.²² Both the Bureau-level precedent relied upon in the *Order*, and the *Order* itself, are consistent with this FCC ruling. The Bureau decisions issued prior to the *Order* expand upon and clarify the application of the principles articulated in *Ackerley*, appropriately providing parties seeking to structure transactions with guidance regarding the types of arrangements that the agency generally will consider non-attributable. And in the *Order*, just as the Commission did in *Ackerley*, the Bureau fully analyzed the particular agreements with respect to the Sander Stations and properly found that Sander would retain the economic incentive to control programming.²³ Indeed, the Bureau concluded its discussion of Free Press’s objections by explaining that its review of transactions –

²⁰ Application for Review at 11-12.

²¹ See *Order* ¶ 28 & n.83.

²² 17 FCC Rcd 10828, ¶ 32.

²³ *Order* ¶ 28.

including the one before it – “encompasses giving careful attention to the economic effects or, and incentives created by, a proposed transaction.”²⁴

Free Press’s suggestion that Sander is a mere “sidecar” company that Gannett will use to evade the media ownership rules²⁵ is also inconsistent with the facts. As set forth in Sander’s opposition to Free Press’s “Petition to Deny,”²⁶ Jack Sander, who owns and operates the Sander Operating Companies, is a veteran broadcaster with nearly a half-century of experience in the industry. He got his start in 1965 at then-WLWC(TV) in Columbus, Ohio, and went on to hold leadership positions at local television stations and station groups (including serving as Vice-Chairman of Belo from 1997-2007) over the succeeding forty-two years. He has long been active in industry organizations as well, including through service as President-Chairman of the NBC Television Affiliates, Vice-Chairman of the Fox Board of Governors, Chairman of the Television Bureau of Advertising, Chairman of Broadcast Music, Inc. (BMI), Chairman of the National Association of Broadcasters Joint Board and Investment Committee, and Chairman of Citadel Broadcasting. In light of Mr. Sander’s long history of experience in and dedication to running television stations, the Bureau correctly rejected Free Press’s unfounded assertion that that Sander would lack the ability and adequate incentives to control the Stations’ programming.

Free Press’s emphasis on the existence of pending applications for review of several Bureau-level decisions involving sharing arrangements²⁷ is similarly misplaced. If anything, the absence of action in those proceedings suggests that the FCC has not objected to the Bureau’s

²⁴ *Id.* ¶ 30.

²⁵ *See* Application for Review at 6-7, 12-13.

²⁶ Sander Operating Companies Consolidated Opposition to Petitions to Deny, MB Docket No. 13-189, at 4-6 (filed Aug. 8, 2013) (“Sander Opposition to Petitions”).

²⁷ *See* Application for Review at 3-4, 8.

treatment of such arrangements and recognizes that any changes to the attribution rules are more appropriately addressed in generally applicable rulemaking proceedings than in proceedings on specific applications.²⁸ Regardless, Free Press should not be permitted to bootstrap its own requests for review of other Bureau-level decisions into a claim of error here.

3. The Bureau Independently Considered and Correctly Analyzed the Public Interest Benefits of Granting the Applications.

Free Press's contention that the Bureau failed to address separately the public interest implications of granting the Applications²⁹ is also baseless. To the contrary, the Bureau described in detail Free Press's arguments that grant of the Applications would undermine the Commission's interest in promoting diversity, localism, and competition.³⁰ In reciting the standard of review applicable to its analysis, the Bureau noted in particular its obligation to consider whether a grant of the Applications would result in public interests harms or benefits.³¹ Moreover, the Bureau properly acknowledged that "[w]here, as here, the Commission has adopted rules to promote diversity, competition, localism, or other public interest concerns, those

²⁸ Moreover, the parties in this case discussed the transactions with Commission-level staff members. *See, e.g.*, Notice of Ex Parte Presentation, MB Docket No. 13-189 (Dec. 18, 2013) (reporting on meeting between representatives of Gannett, Belo, Sander, and Tucker with Phil Verveer, Senior Counselor to Chairman Wheeler, Maria Kirby, Chairman Wheeler's Legal Advisor for Media, Consumer and Governmental Affairs, and Enforcement, Jonathan Sallet, Acting General Counsel of the Commission, and Bill Lake, Chief of the Media Bureau to discuss the structure of the transactions); *see also* Notice of Ex Parte Presentation, MB Docket No. 13-189 (Dec. 19, 2013) (reporting on phone calls and emails between representatives of Free Press and other parties to the Application for Review with members and Gigi Sohn, Special Counsel for External Affairs to Chairman Wheeler, Maria Kirby, Media Advisor to Chairman Wheeler, Adonis Hoffman, Chief of Staff to Commissioner Clyburn, and Clint Odom, Policy Director for Commissioner Rosenworcel during which such representatives reiterated the arguments set forth in their petition to deny).

²⁹ Application for Review at 13-14.

³⁰ *Order* ¶¶ 8-10.

³¹ *Id.* ¶¶ 22-24.

rules may form a basis for determining whether . . . applications are on balance in the public interest.”³² This is especially appropriate where the media ownership and attribution rules are concerned because those rules, as they have evolved over time, reflect careful consideration by the FCC of what will and will not serve the public interest. And the Bureau went on to consider not just compliance with existing rules, but also Free Press’s public interest arguments, finding in the end that the transaction was consistent with the Commission’s “policies in favor of competition, diversity, and localism.”³³ The Bureau’s *disagreement* with Free Press’s position, following careful analysis, does not provide a basis for disturbing the *Order* below.

4. The Bureau Gave Appropriate Weight to the Stated Concerns of the Department of Justice (“DOJ”).

Free Press next contends that the Bureau failed to address the DOJ’s view that the assignment of KMOV(TV) to Sander would raise competitive concerns.³⁴ But here again, the Bureau acknowledged the DOJ’s stated concerns about that market and took them into account in its analysis.³⁵ In any event, the DOJ process resulted in a Consent Decree, not any adjudicated finding of actual competitive harm. Thus, contrary to Free Press’s contention, there was no basis for the Bureau to adopt the DOJ’s articulated concerns as “findings.” Further, the DOJ Consent Decree involves only the St. Louis market. In the markets targeted in Free Press’s Application

³² *Id.* ¶ 22.

³³ *Id.* ¶ 30.

³⁴ Application for Review at 14-16.

³⁵ *Order* ¶ 3 (discussing consent decree with DOJ); *see also* Notice of Ex Parte Presentation, MB Docket No. 13-189 (Dec. 18, 2013) (reporting on meeting between representatives of Gannett, Belo, Sander, and Tucker with Phil Verveer, Senior Counselor to Chairman Wheeler, Maria Kirby, Chairman Wheeler’s Legal Advisor for Media, Consumer and Governmental Affairs, and Enforcement, Jonathan Sallet, Acting General Counsel of the Commission, and Bill Lake, Chief of the Media Bureau, including discussion of the DOJ Consent Decree).

for Review, the DOJ found it unnecessary to seek divestiture or any modification of the proposed arrangements among Sander, Tucker, and Gannett. In addition, as Free Press itself acknowledges, although the DOJ and the Commission both consider competition concerns, the FCC considers diversity and localism as well. For these reasons, it would have been irrational for the Bureau to rely on the DOJ process to support conclusions regarding any market other than St. Louis, or related to the FCC's non-competition-based public interest objectives. Finally, as discussed above, the Bureau confirmed through its own independent analysis that grant of the Applications was consistent with all three of the relevant Commission public interest considerations.

B. The Application for Review Does Not Present a “Novel Question” Warranting Commission Review.

In an attempt to manufacture a “novel” issue warranting Commission review, Free Press suggests that most sharing arrangements involve two or more television stations in the same market while, in this case, Gannett publishes newspapers (but owns no stations) in certain of the markets in which it will provide services to the Stations.³⁶ The Bureau properly rejected this argument as well.

First, as discussed above, the FCC has considered carefully the types of relationships conferring a degree of control sufficient to render them attributable, and has determined that television JSAs and SSAs (as well as unexercised options) do not give rise to attribution. The fact that there is no rule prohibiting or making attributable the types of sharing agreements involved here establishes that this case does *not* present any issues requiring full Commission review. That fact does not, as Free Press would have it, present a reason why the transaction was “novel.” Indeed, if taken to its logical conclusion, Free Press’s position would require

³⁶ Application for Review at 9-10.

Commission-level review of any transaction that violated no established rule but received third-party objections on the ground that the agency “should” have a rule prohibiting it.

Second, and contrary to Free Press’s expansive arguments, there should be *less* concern that an entity owning a newspaper could – or would want to – assume improper control over a television station’s operations. In any event, the precedent regarding when sharing arrangements will or will not give rise to attribution focuses, as the Bureau did in its decision, on the features of sharing agreements that the Commission has found ensure appropriate licensee control.

Third, Free Press emphasizes past FCC statements suggesting that the cross-ownership rule focuses on diversity while the television duopoly rule instead protects competition.³⁷ However, it never explains why this distinction is relevant. And the fact remains that, as discussed above, the Bureau *did* consider the impact of granting the applications on diversity, as well as competition and localism.³⁸ Further undermining its position, Free Press itself contends that sharing agreements involving television stations raise not just competition-related, but also diversity-related, concerns.³⁹ Finally, accepting Free Press’s position would leave the Commission with little (if any) legitimate role in evaluating television station transactions, as the DOJ’s competition analysis would encompass most (if not all) issues of relevance.

C. Granting Free Press the Relief It Seeks in this Proceeding Would Violate the APA and Due Process Requirements.

In the end, Free Press’s Application for Review boils down to a request for wide-scale revision of the FCC’s attribution rules. But a grant of that relief, on review of this adjudicatory licensing proceeding, would run afoul of the APA and violate due process principles.

³⁷ *Id.* at 10.

³⁸ *See supra* Section II.A.3.

³⁹ *E.g.*, Application for Review at 17.

As discussed above, the types of agreements involved in this transaction do not give rise to attribution under existing FCC rules.⁴⁰ Granting Free Press the relief it seeks would effectively change these settled rules in violation of the APA’s rulemaking requirements.⁴¹ It is well settled that administrative agencies “may not . . . avoid[]” the APA’s notice-and-comment rulemaking requirements through “the process of making rules in the course of adjudicatory proceedings.”⁴² Indeed, Free Press’s misdirected request for rule changes in this proceeding undermines its claim as a “party in interest” with standing to file a petition to deny or Application for Review.⁴³ Furthermore, given the previous approval of numerous transactions involving agreements similar to – and, in some cases, more expansive than – those involved here, reversal of the Bureau’s order would violate the APA’s separate mandate that administrative agencies afford similarly situated parties the same treatment.⁴⁴

⁴⁰ See *supra* Section II.A.1.

⁴¹ Among other things, Free Press cites two studies related to issues raised in the Quadrennial Review proceeding. See Application for Review at 14 & nn. 48-49. Consideration of those studies would be appropriate, if at all, in the context of a rulemaking, as neither involves the markets or agreements at issue here. In addition, comments filed in the 2010 Quadrennial Review demonstrate that the 2011 study is fundamentally flawed. See Comments of the National Association of Broadcasters, MB Docket Nos. 09-182, 07-294, at 60-64 (filed Mar. 5, 2012).

⁴² *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion); see *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003) (“[A]n administrative agency may not slip by the notice and comment rule-making requirements . . . through adjudication.”); see also *SEC v. Chenery Corp.*, 318 U.S. 80, 92-93 (1943) (“Before transactions otherwise legal can be outlawed . . . they must fall under the ban of some standard[] of conduct prescribed by an agency of government authorized to prescribe such standards.”).

⁴³ See Opposition of Belo Corp. to “Petitions to Deny,” MB Docket No. 13-189, at 9-11 (filed Aug. 8, 2013); Sander Opposition to Petitions at 2 n.2.

⁴⁴ E.g., *Independent Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996) (“An agency cannot meet the arbitrary and capricious test by treating type A cases differently from similarly situated type B cases The treatment . . . must be consistent.”); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965) (stating that “the Commission’s refusal at least to explain its different treatment . . . was error” and that the FCC must “do more

The application of a hypothetical new standard to the agreements involving the Stations also would violate due process. The D.C. Circuit long has held that “[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”⁴⁵ This principle flows naturally from “[e]lementary considerations of fairness,” which “dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.”⁴⁶

III. CONCLUSION

The transactions at issue in this proceeding were extremely important for each of the parties, requiring careful planning to ensure compliance with all FCC and other regulatory requirements. The Bureau carefully considered the Applications, as well as Free Press’s objections, and properly determined that the proposed transactions and sharing arrangements were consistent with all applicable rules and policies and would serve the public interest. To the extent that Free Press wishes to press for a change in current FCC rules and policies, it can – and must – do so through the rulemaking process. For these reasons, the Application for Review should be denied.

than enumerate factual differences, if any, between . . . cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act”).

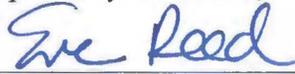
⁴⁵ *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *see also Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

⁴⁶ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 266 (1994).

Tom Chauncey
Gust Rosenfeld, P.L.C.
1 East Washington Street
Suite 1600
Phoenix, AZ 85004-2533

February 6, 2014

Respectfully submitted,



Richard E. Wiley
James R. Bayes
Eve K. Reed
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000

Counsel for Sander Media, LLC

CERTIFICATE OF SERVICE

I, Eve Klindera Reed, hereby certify that on this 6th day of February 2014, I caused the foregoing "Opposition to Application for Review" to be served by first-class mail, postage prepaid, upon the following:

Matthew Wood
Lauren Wilson
Free Press
1025 Connecticut Avenue, NW
Suite 1110
Washington, DC 20036

John E. Feore
Cooley LLP
1299 Pennsylvania Ave., NW
Suite 700
Washington, DC 20004

Adrienne Denysyk
Video Division, Media Bureau
Room 2-A820
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Eric G. Null
Angela J. Campbell
Andrew Jay Schwartzman
Institute for Public Representation
Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

Jennifer Johnson
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004

Best Copy and Printing, Inc.
Portals II, 445
12th Street, S.W., Room CY-B402,
Washington, DC 20554



Eve Klindera Reed