

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)
)

To: The Commission

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Free Press, through its attorneys, the Institute for Public Representation, respectfully replies to the Oppositions filed by Tribune Broadcasting Company II, LLC ("Tribune") and Dreamcatcher Broadcasting, LLC ("Dreamcatcher") (collectively "Opposing Parties" or "Oppositions"), on February 21, 2014.

The full Commission should review the Opposing Parties' shared services agreements ("SSAs") under the Commission's cumulative effect test, which the Media Bureau has repeatedly failed to apply, and find that the agreements violate the Commission's rules. The Commission may reach this result without affecting reliance interests or exceeding its adjudicatory authority.

I. The Commission Should Grant the Relief Requested in the Application for Review Because the Media Bureau Failed to Conduct the Appropriate Analysis

Review of a proposed transfer is always case-specific, and the applicants bear the burden of showing that grant of their application is in the public interest.¹ Tribune and Dreamcatcher have failed to do so in this case, and, in its decision, the Bureau failed to require that showing before granting transfer.² The full Commission should grant Free Press's requested relief

¹ See, e.g., *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 16867, at ¶30 (MB 2013).

² See *Application for Consent to Assignment of Broadcast Station Licenses from Local TV, LLC to Dreamcatcher Broadcasting, LLC*, Application for Review, MB Docket 13-190, at 9-13 (Jan. 22, 2014).

because, contrary to the Bureau's practice of checking only that applicants' SSAs comply with discrete attribution standards, the Commission-endorsed analysis requires examination of the transactions' cumulative effect.

A. Commission Precedent Requires Consideration of the Cumulative Effect

The full Commission has repeatedly engaged in a "cumulative effect" analysis when assessing attributable interests. The Commission's decision in *Ackerley*, the most recent to deal with modern sharing arrangements, continued this practice when it looked beyond individual contract provisions to find that the sharing arrangements in that case were attributable.³ Even *BBC License*—which Dreamcatcher itself cites,⁴ and which addressed attribution of a corporate ownership agreement—explicitly identifies this as the correct analysis:

[E]ach of the discrete factors here, considered alone, render Fox's interest a noncognizable one. . . .

To view each of these factors in isolation, however, would be to undermine the underlying objectives of our attribution rules, that is, recognition of those interests that convey influence or control over an applicant. . . . [T]he Commission has, in adjudicatory proceedings, expressly embraced the conclusion that we must assess the cumulative effect of all relevant factors to determine whether the goals of our multiple ownership rules will be served or hindered by the structure and relationships presented to us.⁵

³ *Shareholders of the Ackerley Group, Inc.*, 17 FCC Rcd 10828 (2002). Dreamcatcher half-heartedly suggests that Free Press waived the right to discuss the Bureau's misapplication of the cumulative effect test because the Petition to Deny did not cite *Ackerley* or use the specific phrase "cumulative effect." Dreamcatcher Opp., at 2. This is obviously ridiculous because Free Press had no reason to make this point until after the Bureau incorrectly applied Commission policy in its decision. At any rate, Free Press argued from the beginning that the provisions of the SSAs must be "taken together." See *Application for Consent to Assignment of Broadcast Station Licenses from Local TV, LLC to Dreamcatcher Broadcasting, LLC*, Petition to Deny, MB Docket 13-190, at 6 (Aug. 19, 2013).

⁴ Dreamcatcher Opp., at 6.

⁵ *Applications of BBC License Subsidiary, L.P.*, 10 FCC Rcd 7926, 7933 (1995) (internal quotations and citations omitted); see also *Applications of Roy M. Speer*, 11 FCC Rcd 18393, 18413-14 (1996) ("[T]he Commission also has articulated the need to assess the cumulative effect of all relevant factors so as to determine whether a party holds an attributable interest."); *Applications of Univision Holdings, Inc.*, 7 FCC Rcd 6672, 6677-78 (1992) (considering "all of

Conceding that sharing arrangements must undergo the cumulative effect analysis, Tribune attempts to defend the Bureau's purported cumulative assessment.⁶ However, while the Bureau implied that it fully considered the transaction, it did not analyze any of the terms of the SSAs or their harm to the public interest. Rather, the Bureau relegated its "analysis" to a single paragraph, in which it declared, with no additional explanation, that the terms of the SSAs were "consistent with [Bureau] precedent."⁷ The Bureau's mechanical application of staff precedent to individual provisions of the SSAs does not constitute an assessment of cumulative effect.

Moreover, in its cumulative effect analysis, the Commission must consider the 15% shared programming provision, despite the Opposing Parties' repeated claims that news sharing is not a feature of their SSAs.⁸ To the contrary, the SSAs explicitly allow for Tribune to provide Dreamcatcher with local news programming throughout the course of their relationship.⁹ The Bureau's review must be based on what the contract permits. The fact that Tribune presently does or does not exercise this contractual right does not shield the programming provision from the cumulative effect analysis; the availability of that right at any point strikes at the heart of the diversity concerns present here.

the circumstances here" and analyzing the "collective effect"); *Applications of KKR Assocs., L.P.*, 2 FCC Rcd 7104, 7107 (1987) ("[W]e believe that we should look at the cumulative effect of all relevant factors to determine whether the goals underlying the multiple-ownership rule will be served or hindered by the structure and relationships presented to us.").

⁶ Tribune Opp., at 9.

⁷ *Application for Consent to Assignment of Broadcast Station Licenses from Local TV, LLC to Dreamcatcher Broadcasting, LLC*, Memorandum Opinion and Order, 28 FCC Rcd 16850, at ¶16 (MB 2013).

⁸ See Tribune Opp., at 7, 11; Dreamcatcher Opp., at 5.

⁹ See Shared Services Agreement § 6.5 ("Service Provider shall have the right to provide to the Station Licensee for broadcast, simulcast, or rebroadcast on the Station *local news* and other programming . . .") (emphasis added).

B. The Department of Justice Offers Additional Support That Case-By-Case, Cumulative Review is Appropriate

The Department of Justice also advocates for a cumulative effect approach in an *ex parte* notice recently filed in the Commission's Quadrennial Review docket. Its experience enforcing the antitrust laws in the broadcasting industry has shown that "even when [sharing] agreements do not run afoul of the bright-line attribution rules," they may nevertheless cede influence or control over to the service provider.¹⁰ The Department's analysis thus focuses, case-by-case, on the function of SSAs over their form—asking whether their collective effect harms the public interest rather than whether specific contract provisions independently satisfy the attribution standards.¹¹ Failing to account for such effects would otherwise create opportunities to circumvent the Commission's rules and their underlying goals.¹²

II. The Commission May Grant the Requested Relief Without Affecting Any Reliance Interests

The Opposing Parties incorrectly claim that they properly relied on Commission precedent and Bureau orders issued pursuant to delegated authority.¹³ The Commission decisions cited by the Opposing Parties do not specifically address the issue of SSAs, and reliance interests are very limited when parties rely on unreviewed staff decisions.¹⁴ In any event, strong public interest concerns outweigh any reliance interests here.

¹⁰ *2010 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*, Ex Parte Submission of the United States Department of Justice, MB Docket 09-182, at 2, 16 (Feb. 20, 2014).

¹¹ *Id.* at 12.

¹² *Id.* at 2.

¹³ Tribune Opp., at 8; Dreamcatcher Opp., at 7.

¹⁴ Dreamcatcher cites *BBC License* for the proposition that the Commission has reviewed and green-lighted arrangements between stations for services and programming. Dreamcatcher Opp., at 6. This is misleading; the challenged relationship in *BBC License* was a network affiliation agreement, and there was no SSA or other sharing arrangement involved. *BBC License*, 10 FCC Rcd at 7931.

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

The Opposing Parties' reliance interests on unreviewed staff decisions are extremely limited. Staff decisions are not binding precedent on the Commission when the Commission has not reviewed the staff ruling.¹⁵ The D.C. Circuit has emphasized that a subordinate body of an agency cannot bind the decision-making of the agency.¹⁶ Here, the Commission last reviewed a Bureau decision on sharing arrangements twelve years ago, in *Ackerley*—a decision that supports overturning the Bureau's decision here. Since then, it has not considered, much less affirmed, the Bureau decisions on which the Opposing Parties rely, even though applications for review are pending.¹⁷ Until the Commission issues a decision on this question, it is improper to assume that the Commission's position would be the same as the Bureau's.¹⁸ Thus, Tribune is incorrect to claim that the Commission's inaction on pending applications for review constitutes an endorsement of the Bureau's approach.¹⁹

Dreamcatcher argues that parties may rely on staff decisions, citing *Fox Television Stations*, where the Supreme Court rejected the Commission's imposition of fines for indecent broadcasts when its precedent permitted the broadcast of similar content.²⁰ However, the Court resolved that case on fair notice grounds, finding that the Commission's alleged notice of a

¹⁵ *Edwin Edwards, Sr.*, 16 FCC Rcd 22236, 22250 (2001).

¹⁶ *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

¹⁷ *See, e.g., Piedmont Television of Springfield License LLC*, 22 FCC Rcd 13910 (MB 2007), *app. for review pending*; *Malara Broadcast Group*, 19 FCC Rcd 24070 (MB 2004), *app. for review pending*.

¹⁸ *See Edwards*, 16 FCC Rcd at 22250 (standing for this proposition when staff decisions have been challenged, but not yet reviewed by the Commission); *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).

¹⁹ Tribune Opp., at 8. In fact, the Commission in its 2010 Quadrennial Review asked if and how it should attribute certain sharing arrangements, making Tribune's argument even less persuasive. Moreover, Tribune's approach ignores the functional realities of the Commission, where years may pass before the Commission reviews a staff decision.

²⁰ Dreamcatcher Opp., at 7.

potential rule change was insufficient because it was an "isolated and ambiguous statement" from almost fifty years earlier.²¹ Additionally, the full Commission had since issued decisions contrary to that fifty-year old statement.²² By contrast, the Commission here gave broadcasters specific notice in the 2010 Quadrennial Review that it was considering attributing SSAs, and it has not released any contrary decisions since providing that notice.²³

The Commission has consistently warned that parties who rely on staff decisions pending review assume the risk of any consequences—including economic—that result from reversal.²⁴ Thus, the Opposing Parties' reliance interests are, at best, very limited.

B. Strong Public Interest Concerns Outweigh Weak Reliance Interests

Even assuming that reversing the staff decision would disrupt regulatory certainty or business investments, the Commission has held that public interest considerations can override reliance interests.²⁵

²¹ *Fox Television Stations, Inc. v. FCC*, 132 S. Ct. 2307, 2319 (2012).

²² *Id.*

²³ *2010 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*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, ¶¶204-05 (2011); *see also Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Notice of Proposed Rulemaking, 19 FCC Rcd 15238, 15239, ¶2 (2004).

²⁴ *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 the opposition); *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") (emphasis added); *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).

²⁵ *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).

Very strong public interest concerns are involved here. The Opposing Parties' SSAs unequivocally allow for news sharing—over which Tribune would exercise editorial judgment—which would eliminate an independent source of news in the market.²⁶ The SSAs thus reduce the diversity of viewpoints available to news consumers in the market, where Tribune already owns a major daily newspaper.²⁷ The size of the market further exacerbates this negative effect on diversity and the public interest. A handful of news sources currently provide local coverage to the market. Yet the market serves a large and diverse population that is growing, requiring greater independent coverage. Presently, the market encompasses 719,000 households that are limited in their options to just eight independent sources of television news due to the Opposing Parties' SSAs.²⁸ The SSAs have the potential to deprive large news-consuming populations of the diversity in viewpoints and programming that best informs local communities.

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.

III. It is Appropriate for the Commission to Grant the Requested Relief in This Proceeding

It is black letter law that the Commission may establish policy—and has done so—through adjudication.²⁹ Dreamcatcher agrees that the Commission may form agency policy through adjudications such as this one, questioning instead whether the Commission *should* exercise its adjudicatory authority.³⁰

²⁶ Petition to Deny, at 7.

²⁷ Petition to Deny, at 2, 7.

²⁸ The Petition to Deny cited the market as covering 710,100 households. Petition to Deny, at 7. That figure was based on then-current data, which has since been updated. *See* Nielsen Local Television Market Universe Estimates, 2013-2014, at 2, *available at* http://www.tvb.org/media/file/TVB_Market_Profiles_Nielsen_TVHH_DMA_Ranks_2013-2014.pdf.

²⁹ *See, e.g., FCC v. Fox Television Stations*, 556 U.S. 502, 520 (2009) (affirming the Commission's broad policy changes to established rules through an adjudication).

³⁰ Dreamcatcher Opp., at 8.

It is wholly proper for the Commission to address the issues presented in this adjudication, and it should do so. The transaction cannot be squared with the Commission's rules and policies, including its long-standing cumulative effect test. The Bureau has ignored the Commission-issued requirement to look beyond individual terms of sharing arrangements, and the Commission must correct this error. The harmful effects of the Opposing Parties' SSAs on the public interest and the Bureau's failure to follow Commission precedent provide reason enough to overturn this transaction. Given that the Commission plans to revisit the attribution rules,³¹ action here avoids the further harm to the public interest and unfairness to the parties that would result from approving transactions that may be prohibited in the near future.

Conclusion

For the foregoing reasons, the Commission should review and reverse the Bureau's decision.

Respectfully submitted

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³¹ See Tom Wheeler, *Protecting Television Consumers By Protecting Competition*, FCC BLOG (Mar. 6, 2014), <http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition>. Even the Chairman has expressed skepticism over such sharing arrangements.

CERTIFICATE OF SERVICE

I, Catherine Yang, hereby certify that copies of the Reply to Opposition to Application for Review by Free Press, through its attorneys, the Institute for Public Representation, have been served by first-class mail and courtesy copy by e-mail, this 6th of March, 2014, on the following persons at the addresses shown below.

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