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

National Association of Broadcasters, Petitioner,	)	
v.	)	No. 14-1072
Federal Communications Commission and United States of America, Respondents.	)	

MOTION TO DISMISS

The Federal Communications Commission respectfully moves to dismiss the petition for review filed by the National Association of Broadcasters ("NAB"). The petition seeks judicial review of a public notice issued by the FCC's Media Bureau. That staff-level public notice is not a final "order of the Commission." 47 U.S.C. § 402(a). Therefore, the Court lacks jurisdiction over NAB's petition. *See* 47 U.S.C. § 155(c)(7).

BACKGROUND

On March 12, 2014, the FCC's Media Bureau issued a public notice "to provide guidance concerning the Bureau's processing of applications seeking Commission approval of proposed [broadcast television] transactions that involve combinations of sharing arrangements and contingent or financial interests." Public Notice, *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, DA 14-330 (released March 12, 2014)

("Public Notice"). "This action [was] taken" by the Chief of the Media Bureau "pursuant to authority delegated by 47 C.F.R. § 0.283 of the Commission's rules." *Id.* at 3.

The Public Notice announced that, in "reviewing broadcast assignment and transfer applications going forward," including those currently pending, the Media Bureau would "closely scrutinize any application that proposes that two (or more) stations in the same market" will "(1) [e]nter into an arrangement to share facilities, employees, and/or services or to jointly acquire programming or sell advertising … and (2) [e]nter into an option, right of first refusal, put/call arrangement, or other similar contingent interest, or a loan guarantee." Public Notice at 2. According to the Public Notice, such "careful scrutiny" is warranted by 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 … may obtain a degree of operational and financial influence that deprives the licensee of the second station of its economic incentive to control programming." *Id.*

On May 12, 2014, NAB filed with this Court a petition for review of the Media Bureau's Public Notice.

ARGUMENT

Under the Hobbs Act, 28 U.S.C. § 2342(1), and section 402(a) of the Communications Act, 47 U.S.C. § 402(a), this Court's jurisdiction extends "only to *final* orders" of the FCC. *N. Am. Catholic Educ. Programming Found. v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006). In this case, NAB seeks judicial review of a Public Notice issued by a subordinate Bureau of the FCC. The Media Bureau's Public Notice is plainly not a final order of the Commission. Consequently, the Court has no jurisdiction to review the Public Notice.

1. The Communications Act makes clear that courts lack jurisdiction to review actions taken by FCC staff pursuant to delegated authority. Instead, "[t]he filing of an application for review" with the Commission "shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation" of Commission authority. 47 U.S.C. § 155(c)(7).

In construing this exhaustion requirement, this Court has found that "Congress did not intend that the court review a staff decision that has not been adopted by the Commission itself." *Int'l Telecard Ass'n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999) (quoting *Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302, 1304 (D.C. Cir. 1997)). The Court has also expressly held that "a petition for review filed after a bureau decision but before resolution by the full Commission is subject to dismissal as incurably premature." *Id.*

The Court should dismiss NAB's petition for review because NAB failed to comply with 47 U.S.C. § 155(c)(7). Before NAB can obtain judicial review of the Media Bureau's Public Notice (an action taken pursuant to delegated authority), the Communications Act required that it first file an application for FCC review of the Bureau's action. *See* 47 U.S.C. § 155(c)(7); 47 C.F.R. § 1.104. NAB never filed such an application.

2. To be sure, NAB did submit two letters to the FCC's Secretary in which it made a number of objections to the Public Notice. *See* Letter from Jane E. Mago, NAB, to Marlene H. Dortch, FCC, April 10, 2014 ("April 10 Letter") (appended to this motion as Attachment A); Letter from Jane E. Mago, NAB, to Marlene H. Dortch, FCC, May 1, 2014 ("May 1 Letter") (appended to this motion as Attachment B). But neither of those letters qualifies as—or even purported to be—an application for review.

The first letter did not even ask that the full Commission review the Public Notice. In it, NAB simply "encourage[d] the *Bureau* to withdraw the Public Notice." April 10 Letter at 4 (emphasis added).

NAB's May 1, 2014, letter did "request that the Commission direct the Bureau to withdraw the Public Notice." May 1 Letter at 2. But NAB did not characterize that May 1 Letter as an application for review of the Public Notice; nor did that letter cite 47 C.F.R. § 1.115, the FCC rule governing applications for

review. Moreover, even assuming that the May 1 Letter might fairly be deemed an application for review, it was untimely, because it was filed more than thirty days after the March 12 release of the Public Notice. *See* 47 C.F.R. § 1.115(d) (an application for review "shall be filed within 30 days of public notice" of the challenged staff action).

In any event, even if NAB had filed a timely application for review of the Public Notice, "the act of filing a request for Commission review" would not "in itself" be "sufficient to satisfy the judicial review prerequisites of [47 U.S.C.] § 155(c)(7)." *Int'l Telecard Ass'n*, 166 F.3d at 387. When a party applies for FCC review of staff action, the time period for filing a petition for judicial review commences only after "public notice is given of orders disposing of all applications for review filed in any case." 47 U.S.C. § 155(c)(7). Thus, NAB could not have obtained judicial review of the Bureau's Public Notice until the Commission *acted* on any validly filed applications for review. *See Int'l Telecard Ass'n*, 166 F.3d at 388.

3. In a footnote in its petition for review, NAB asserts that the Bureau's Public Notice "constitutes final agency action subject to judicial review because it 'mark[s] the consummation of the [Commission's] decisionmaking process.'" Petition for Review at 3 n.2 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). Contrary to NAB's contention, the Communications Act plainly states that a

decision by FCC staff is not judicially reviewable until the Commission has acted on a timely filed application for review. 47 U.S.C. § 155(c)(7).

NAB claims that because the Commission did not act on NAB's request in the May 1 Letter for withdrawal of the Public Notice by May 8, 2014 (a deadline invented by NAB), "any further efforts" to seek FCC review of the Public Notice "would be futile." Petition for Review at 3 n.2. Insofar as NAB asserts that any action by the FCC in this proceeding is unlikely, that is because NAB's request for Commission review of the Media Bureau's Public Notice is untimely. In any event, the exhaustion requirement prescribed by 47 U.S.C. § 155(c)(7) contains no futility exception. And the Court may "not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Spinelli v. Goss*, 446 F.3d 159, 162 (D.C. Cir. 2006) (quoting *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001)).[1]

In sum, NAB "failed to exhaust its administrative remedies and presents no valid reason why this failure should be excused." *Richman Bros. Records*, 124 F.3d at 1304. The petition for review should be dismissed for lack of jurisdiction.

[1] To the extent that one of NAB's members is aggrieved by the Bureau's application of the policy outlined in the Public Notice to a particular licensing transaction, it can seek review of that decision by the full Commission and the courts.

CONCLUSION

For the foregoing reasons, the Court should grant the motion to dismiss.

Respectfully submitted,

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Federal Communications Commission
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May 30, 2014

Attachment A

April 10, 2014

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, DA 14-330.

Dear Ms. Dortch:

We write to express our objections to the Public Notice released by the Media Bureau on March 12, 2014, entitled *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests* ("Public Notice"). Our objections are both procedural and substantive.

First, the Public Notice is procedurally deficient. The Public Notice purports to declare new substantive requirements for the evaluation of certain broadcast television transactions, but was issued without the requisite notice and opportunity for comment. The Public Notice creates a new standard of review—essentially, a "strict scrutiny" standard—for transactions that involve sharing arrangements and contingent or other financial interests. Public Notice 2 ("[W]e have determined that proposed combinations of … sharing arrangements and contingent financial interests warrant careful scrutiny …."); *id.* ("[T]he Bureau will closely scrutinize any [such] application"). The Public Notice also identifies circumstances that will draw particularly negative review under the newly-announced standard, such as situations where the broadcasters "share[] the same lending institution" and "a portion of the purchase price will be financed by a loan from that lending facility." *Id.* This presupposes that "financial influence *inheres* in lending relationships," *id.* (emphasis added) – a sphere of relationships into which the Commission's attribution rules authorize no inquiry and thus is legally irrelevant. *See* 47 C.F.R. § 73.3555, Note 2.

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Indeed, the new substantive standards for evaluating proposed transactions turn the Commission's longstanding attribution regulations on their head. The current ownership attribution rules expressly provide that "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*." 47 C.F.R. § 73.3555 Note 2e (emphasis added). Under the Bureau's new standards, however, merely "[*e*]*nter[ing] into an option*, right of first refusal, put/call arrangement, or similar contingent interest, or a loan guarantee" will trigger stringent review and, ultimately, likely rejection of an application proposing a change of station ownership. Public Notice at 2 (emphasis added).

The Public Notice is clearly designed to, and will for all practical purposes, exert strong pressure on applicants to withdraw existing applications that do not conform to these criteria and in the future only file ones that do. *See* Public Notice 3 (stating that "applicants must submit all . . . documentation . . . relevant to the Commission's review . . . as described in this Public Notice" or "consideration of the application will be delayed"); *see also* Statement of William Lake, Chief, Media Bureau on Processing Guidance for Future Proposed Broadcast TV Transactions (suggesting that future parties can "simplify[]" review of their applications by accounting for the Public Notice "as they structure their deals," and that "parties with pending applications" can "amend those applications . . . to simplify the review process"). "It cannot seriously be argued that this screening device does not create a strong incentive to meet [its] goals. . . . A station would be flatly imprudent to ignore any one of the factors it knows may trigger intense review." *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998). As the D.C. Circuit observed in another context, the Commission is "interested in results, not process, and is determined to get them." *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001); *see also id.* (noting the FCC's "long history" of "raised eyebrow regulation") (citations and internal quotation marks omitted).

Because these are substantive requirements that change existing law, not mere processing guidelines, they constitute legislative rules that can only be adopted pursuant to notice and comment. *See* 5 U.S.C. § 553(e); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("An agency may not escape . . . notice and comment . . . by labeling a major substantive legal addition to a rule a mere interpretation."); *Sprint Corp v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (explaining that "an amendment to a legislative rule must itself be legislative"). Moreover, as a result of these changes, transactions that comply in all pertinent respects with the Commission's existing attribution rules will be subject to increased scrutiny

and likely rejection under the revised public interest standard. This raises additional issues of fair notice, *see Trinity Broadcasting of Fla. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), and indeed the rationality of the Commission's decisionmaking processes more generally, *see Motor Vehicle Mfrs Ass'n v. State Farm Ins.*, 463 U.S. 29 (1983).

In addition, the Public Notice was outside the scope of the Media Bureau's delegated authority. Whatever one's view on these issues, they clearly represent an important and "novel question[] of law, fact, or policy." 47 C.F.R. § 0.283. For the last decade, the Commission has not considered these types of sharing arrangements to be attributable for purposes of the ownership rules, and indeed the Bureau has explicitly approved them with the Commission's blessing. *See, e.g.,* Applications for Consent to Transfer Control from Shareholders of Belo Corp. to Gannett Co., Inc., DA 13-2423, MB Docket No. 13-189 (rel. Dec. 20, 2013), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1220/DA-13-2423A1.pdf; Application for Assignment of License KZTV(TV), Corpus Christi, Texas, DA 10-495 (rel. March 26, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-495A1.pdf. This sudden reversal in the Commission's approach to the standard of review for the applications at issue and the factors that will trigger heightened scrutiny (and likely rejection) of those applications is plainly a "novel" one that implicates important legal and policy judgments. Any effort to use delegated authority to resolve these issues and thereby "avoid judicial review" through "a sort of administrative law shell game" is inappropriate and unacceptable. *AT&T v. FCC*, 978 F.2d 727, 731-32 (D.C. Cir. 1992).

Second, the Public Notice suffers from grave substantive flaws. The Bureau's singling out of a class of applications for what is plainly intended to be "fatal in fact" review amounts to a categorical presumption (and practical prohibition) against such transactions and a dramatic shift in the Commission's existing policies. Many of these transactions will present important public benefits by allowing small or mid-size struggling stations—including minority-owned stations—to survive and offer valued local services in today's intensely competitive media marketplace, thus promoting the Commission's asserted goals of competition, localism, and diversity. The newly minted presumption against such transactions thus undermines these longstanding Commission goals and departs from established policy upon which licensees have relied, and does so without reasoned explanation. *Cf. FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (agency must provide reasoned explanation when "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests"). In short, the Bureau's failure to acknowledge the potential benefits

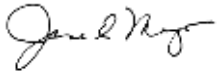
of sharing arrangements with contingent financial interests and its conclusion that they will very rarely satisfy the public interest standard are arbitrary and capricious.

The Bureau's determination is also deficient because it is improperly based on speculation and conjecture, rather than concrete evidence of a problem that requires resolution. *See ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." (citations and internal quotation marks omitted)). The Bureau's invocation of a single 2002 decision, *see* Public Notice 1 & n.2, and its unsubstantiated speculation that "a broadcaster that has entered into a sharing arrangement with another same-market station in which it also has a contingent financial interest . . . *may* obtain a degree of operational and financial influence that deprives the licensee of the second station of its economic incentive to control programming" or that "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" are insufficient to justify a categorical presumption against such transactions, Public Notice 2 (emphases added). The Bureau must "provide more than its own broadly stated fears to justify" its radical change of policy. *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995).

Finally, the Public Notice impermissibly prejudges some of the very issues regarding shared service agreements that will apparently be presented in the Commission's Further Notice of Proposed Rulemaking. *See FCC Adopts TV JSA Attribution Rules, Begins 2014 Media Ownership Quadrennial Review, and Proposes Benefits for Small Business Owners*, News Release (March 31, 2014), *available at* http://www.fcc.gov/document/fcc-adopts-jsa-rule-and-begins-2014-media-ownership-quadrennial-review.

In all of these respects, the Public Notice violates the Administrative Procedure Act. It is an abuse of the Bureau's delegated authority and is unreasoned, premature, and inconsistent with longstanding Commission policies, objectives, and existing regulations. Accordingly, we encourage the Bureau to withdraw the Public Notice and eliminate the improper pressure on—and *de facto* rule against—the broadcast transactions at issue.

Sincerely yours,



Jane E. Mago
Executive Vice President and General Counsel

cc: William Lake, Maria Kirby, Adonis Hoffman, Clint Odom, Matthew Berry, Courtney Reinhard

Attachment B

May 1, 2014

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, DA 14-330.

Dear Ms. Dortch:

The National Association of Broadcasters ("NAB")[1] writes to express further objections to the Media Bureau's Public Notice, entitled *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests* ("Public Notice"), in light of the Commission's *Further Notice of Proposed Rulemaking and Report and Order* of March 31, 2014 ("March 31 Decision"). The Media Bureau's Public Notice is arbitrary and capricious for the reasons set forth in NAB's letter of April 10, 2014. The legal deficiencies of the Public Notice are compounded by the Commission's March 31 Decision in the following respects.

First, the Public Notice is inconsistent with the regulatory framework established in the March 31 Decision. The March 31 Decision provides that Joint Sales Agreements ("JSAs") for more than 15% of a television station's weekly advertising time must be attributed for purposes of the media ownership rules, absent a waiver. *See* March 31 Decision ¶¶ 340, 364. For all other shared service agreements ("SSAs"), the Commission made no decision and expressly declined to impose regulation. In fact, the Commission stated that its decision with respect to JSAs "*does not disturb other sharing agreements*, such as those that allow stations to share facilities, provide local news production assistance, or share administrative and technical personnel, and any operational efficiencies and related potential public interest benefits created by these agreements will continue." *Id.* n.1104 (emphasis added). Rather than regulate SSAs, the Commission found that it lacked sufficient information to "formulate sound public policy," *id.* ¶ 327, and proposed "a disclosure requirement that would help the Commission and the public determine the extent to which [SSAs] may impact the Commission's policy goals," *id.* n.1104, and to "provide the basis for informed decision making about any necessary future Commission regulation impacting SSAs or particular categories of SSAs," *id.* ¶ 329. The Public Notice's pronouncement that the Media Bureau immediately will regulate SSAs with contingent interests by applying different

[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Commission and other federal agencies, and the courts.

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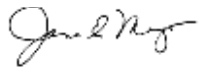
and greater scrutiny cannot be reconciled with the approach adopted in the March 31 Decision. The mixed signals communicated by these two actions thus amplify the Public Notice's flaws.

Second, it is very disturbing that the March 31 Decision barely acknowledges the Public Notice. The March 31 Decision cites the Public Notice just once, in a footnote, as support for the observation that television JSAs have increased in prevalence and that such agreements are getting more attention in broadcast television transactions. *See* March 31 Decision ¶ 342 & n.1048. The Commission nowhere recognizes that the Public Notice purports to regulate *all* television sharing arrangements with contingent interests, not merely JSAs, and certainly never explains or justifies the impact of the Public Notice on television licensees and station transactions. This silence again amplifies the arbitrary and capricious nature of the Public Notice. *See FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *see also Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) ("Whatever the ground for the [agency's] departure from prior norms, . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency's action.").

Third, the Media Bureau's actions are fatally premature. The Public Notice prejudges the pending rulemaking and purports to adopt standards that the Commission has thus far declined to endorse. The March 31 Decision makes clear that the Commission lacks any working definition of SSAs, *see* March 31 Decision ¶ 329, and, as noted above, does not even possess adequate information to regulate such agreements, *see id.* ¶ 8. The FCC cannot regulate on the basis of speculation and conjecture. *See, e.g., ALLTEL Corp. v. FCC*, 838 F.2d 551, 560-61 (D.C. Cir. 1988).

In sum, the Public Notice violates the Administrative Procedure Act. It cannot be squared with the March 31 Decision, reflects unreasoned action, and sends conflicting signals to broadcasters as to the rules of the game for sharing arrangements. As a result of these deficiencies and those set forth in NAB's letter of April 10, 2014, we respectfully request that the Commission direct the Bureau to withdraw the Public Notice and immediately cease and desist application of the strict scrutiny standard to sharing arrangements that involve contingent interests. We request that the Commission take this action by May 8, 2014.

Sincerely yours,



Jane E. Mago
Executive Vice President & General Counsel

cc: William Lake, Maria Kirby, Adonis Hoffman, Clint Odom, Matthew Berry, Courtney Reinhard

14-1072

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CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on May 30, 2014, I electronically filed the foregoing Motion To Dismiss with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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