

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
MAY 30 2014
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FOR DISTRICT OF COLUMBIA CIRCUIT
FILED **MAY 30 2014**
CLERK

NATIONAL ASSOCIATION OF
BROADCASTERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION and UNITED STATES OF
AMERICA,

Respondents.

Case No. 14- 14-1092

2014 MAY 30 P 2:52

OFFICE OF GENERAL COUNSEL

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 and 2344, 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 the Federal Communications Commission’s *2014 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*; *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted*

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 (“Commission”) and other agencies, and the courts. NAB and its member broadcasters actively participated in the proceedings below.

Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Industry; Rule and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets, Further Notice of Proposed Rulemaking and Order, FCC No. 14-28, 2014 WL 1466887 (rel. Apr. 15, 2014) (“Order”). A synopsis of the Order was published in the Federal Register on May 20, 2014. See 79 Fed. Reg. 28996. A copy of the Order is attached to this Petition as Exhibit A. Venue lies in this Court pursuant to 28 U.S.C. § 2343.

According to Section 202(h) of the Telecommunications Act of 1996, the Commission “shall” review its broadcast ownership rules every four years, “determine whether any of [those] rules are necessary in the public interest as the result of competition,” and “repeal or modify any regulation it determines to be no longer in the public interest.” Pub. L. No. 104-104, § 202(h), 110 Stat. 111-12. Despite these unambiguous commands, the Commission failed to complete its required 2010 quadrennial review, which began in 2009, and has failed to determine whether its existing broadcast ownership regulations serve the public interest or to “repeal or modify” any of those regulations. Instead, the Order announces that the Commission will merge its prior quadrennial review into a new 2014 proceeding, thereby thwarting its statutory obligations and kicking the proverbial can down the road. See Order ¶ 1 (“incorporating the existing 2010

record” into the new proceedings “and seeking new and additional information and data” before determining whether existing rules remain in the public interest). By refusing to complete its 2010 quadrennial review, the Commission’s Order unlawfully withholds agency action required by Congress and arbitrarily and capriciously retains burdensome regulations that are no longer in the public interest. *See* Dissenting Statement of Commissioner Ajit Pai (“Pai Dissent”), Order at 219-20.

Although the Commission failed to make any final determination about the need for its existing broadcast ownership rules, despite having studied them for the last five years, the Order adopts a new rule restricting joint sales agreements (“JSAs”) between broadcasters.² Specifically, and contrary to long-standing Commission policy and practice, the agency determined that JSAs for more than 15% of a television station’s weekly advertising time will now be attributable for purposes of the Commission’s broadcast ownership rules. *See* Order ¶ 340. The Commission’s only justification for this further limitation of broadcasters’ rights is its unsubstantiated assertion that certain television JSAs “convey the incentive and potential for the broker to influence program selection and station operations.” *Id.* ¶ 350. In stark contrast, for all other shared service agreements—of which JSAs

² JSAs authorize a broker to sell some or all of the advertising time on a brokered station. *See* Order ¶ 342.

are a subset—the Commission expressly *declined* to adopt any regulation on the ground that the Commission lacked sufficient information to “formulate sound public policy.” *Id.* ¶ 327.

Further, despite a conspicuous lack of evidence of harm associated with television JSAs or reasoned explanation for the new policy, the Order arbitrarily and capriciously declines to grandfather existing television JSAs for more than 15% of the brokered station’s advertising time. *See id.* ¶ 367. Instead, the Commission requires that broadcasters that are parties to covered JSAs unwind those transactions within the next two years in order to comply with the Commission’s broadcast ownership rules—an arbitrary window that closes *before* the Commission can be expected to make a determination that its existing ownership rules do, in fact, serve the public interest. *See* Pai Dissent, Order at 226 (observing that the Media Bureau is expected to provide a recommendation to the Commission on ownership rules by June 30, 2016).

The Order is final agency action that has significant and immediate adverse consequences for NAB and the broadcasters whose interests it represents.³

³ The Commission’s JSA rule constitutes final agency action subject to judicial review. *See* 5 U.S.C. § 551(13). Insofar as the remainder of the Order reflects the Commission’s refusal to act within the four-year period prescribed by Congress, it is subject to judicial review as a failure to take a required agency action. *See id.* (“agency action” includes “failure to act”); *see also Norton v. S. Utah Wilderness* (Cont’d on next page)

Specifically, the Order subjects NAB's members to onerous regulations that do not serve the public interest, in violation of Congress's express command in Section 202(h) of the Telecommunications Act, and imposes new legal obligations that render previously legitimate transactions invalid, require costly restructuring of existing business arrangements, and restrict broadcasters' ability to enter into advantageous joint sales agreements in the future.

NAB now seeks relief from the Order on the grounds that: (1) the Commission has withheld or unreasonably delayed the quadrennial review required by law; (2) the Order is arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706; (3) the Order is contrary to constitutional right; and (4) the Order is otherwise contrary to law.

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

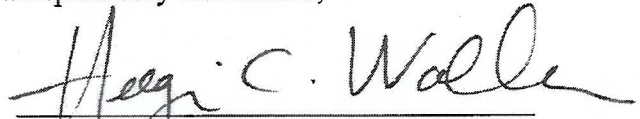
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Alliance, 542 U.S. 55, 62-63 (2004) (“failure to act” includes “failure to promulgate a rule or take some decision by a statutory deadline”).

Dated: May 30, 2014

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

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*

Exhibit A

**IN THE UNITED STATES COURT OF APPEALS
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NATIONAL ASSOCIATION OF
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CORPORATE DISCLOSURE STATEMENT

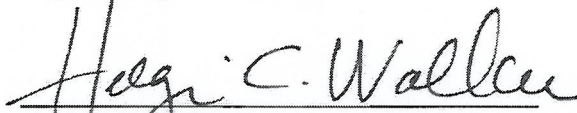
Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Petitioner National Association of Broadcasters (“NAB”) states as follows:

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 30, 2014

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

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Helgi C. Walker

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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*

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2014, I caused copies of the foregoing Petition for Review and Corporate Disclosure Statement to be delivered by hand to the following parties:

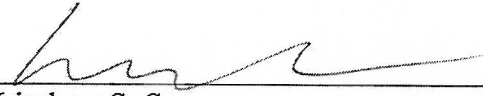
Jon Sallet
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-A741
Washington, D.C. 20554

*Counsel for Federal
Communications Commission*

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

Kristen C. Limarzi
Chief, Appellate Section,
Antitrust Division
U.S. Department of Justice
Room 3222
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-00001

Counsel for United States of America



Lindsay S. See
(Application for admission pending)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036